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No. _____

In The

Supreme Court of the United States

October Term, 1994

THE MILL, a limited partnership,

Petitioner,

vs.

STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR WRIT OF CERTIORARI

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

This case presents the issue of how property must be valued when a state is directed by the United States to acquire real property to allow the United States to perform, at no cost to the property owner, remedial action to correct existing radioactive contamination required by federal statute. Does the state, acting through the instrumentality of its courts, take property without paying just compensation if – in an eminent domain proceeding brought pursuant to the statute – the state denies the owner the right to recover the value of the property determined without regard to the cost of the contemplated remedial action?

This case squarely presents a question left open by *Lucas*, i.e., how a landowner's expectations are shaped by land-use regulations in existence before he acquires title. Where the owner purchases land in reliance on the state's prior termination of regulations which restricted use of part of the land, does the state – by subsequently regulating that part of the land to prohibit all economically viable use – interfere with the owner's reasonable investment-backed expectations so substantially that the state effects a compensable taking?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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DECISIONS BELOW

The decision of the Colorado Supreme Court, en banc, is reported at 887 P.2d 993 (1994), and is reproduced as Appendix (App.) A. The decision of the Colorado Court of Appeals on rehearing is reported at 868 P.2d 1099 (1993), and is reproduced as Appendix B. The decision of the Colorado Court of Appeals before rehearing is reproduced as Appendix C. The initial decision of the Colorado Supreme Court is reported at 809 P.2d 434 (1991) and is reproduced as Appendix D. The initial decision of the Colorado Court of Appeals is reported at 787 P.2d 176 (1989) and is reproduced as Appendix E. The

order of the District Court, Gunnison County, Colorado, is reproduced as Appendix F. The order of the District Court, City and County of Denver, Colorado, is reproduced as Appendix G. Page references are to the versions in the appendix.

JURISDICTION

The decision of the Colorado Supreme Court was entered on December 19, 1994, and a timely petition for rehearing was denied on January 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The provisions of 28 U.S.C. § 2403(b) may be applicable to this proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Supremacy Clause, Article VI, Clause 2 of the United States Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The Supremacy Clause provides in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or

shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§ 7901-7942 (1988), Colorado Revised Statutes, C.R.S. § 25-11-303(d)(III) (Repl. vol. 11A 1989), Radiation Control, and C.R.S. § 24-56-117(1)(c) (Repl. vol. 10B 1988), Relocation Assistance and Land Acquisition Policies. The relevant portions of the statutes are set out at Appendix L, J and K, respectively. Citations are to the version in the Appendix.

STATEMENT OF THE CASE

In 1973, the Petitioner, The Mill ("The Mill"), purchased 61 acres of industrially-zoned land in Gunnison, Colorado, for $260,000. In 1991, Respondent, State of Colorado, Department of Health ("CDOH"), obtained title to all 61 acres of The Mill's land in an eminent domain proceeding in which The Mill was awarded nothing. This case is the consolidated appeal of The Mill's regulatory taking action and CDOH's subsequent condemnation proceeding.

The Mill's property is divided into an approximately 35 acre "tailings pile" parcel, and an approximately 25 acre "mill yard" parcel which is improved with four wells, a 40,000 square foot "mill" building and a 3,000 square foot office building. In the late 1950's and early 1960's, the property was used as a uranium mill and disposal site for uranium mill tailings. At that time, the property was subject to licensure by the Atomic Energy Commission ("AEC") authorizing possession of uranium

ore. When milling operations ceased in 1962, AEC issued a separate license for the mill yard which permitted possession of source material produced in past milling activities. In 1964, the property was sold to Colorado Ventures, Inc. ("Colorado Ventures"), which had been issued a license by AEC authorizing possession and storage of the buildings and equipment on the mill yard parcel. In 1968, that license, no. SUA-809, was amended to allow the transfer of equipment if decontaminated properly in accordance with AEC standards. In 1968, Colorado was delegated authority by AEC to regulate radioactive materials previously under AEC's jurisdiction. CDOH was given the regulatory jurisdiction to license and control the possession and use of radioactive materials. Thus, CDOH was given jurisdiction over license no. SUA-809 without modification. App. 55, 124-125.

In 1971, Colorado Ventures obtained an exemption from general licensure of the mill yard parcel as a result of its stabilization. At that time, cleanup efforts were limited to buildings and equipment, with an emphasis on alpha contamination.[1] App. 125. Although other types of radiation, including radon and other forms of low-level radiation, could be detected as early as 1971, there was insufficient concern for the hazard from these other forms of radiation. After Colorado Ventures completed the required decontamination process, CDOH terminated license no. SUA-809.[2] When that license was terminated,

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[1] Since 1971, other types of radiation, including radon, radon progeny called radon daughters and gamma radiation have become more important. App. 125.

[2] The tailings pile remained licensed before and during The Mill's ownership of the property.

the 25 acre mill yard parcel was authorized by CDOH for unrestricted use. App. 125.

In February 1973, one of The Mill's general partners, Marcus Bishop, conferred with CDOH representatives and reviewed CDOH's files to obtain information about the property, because The Mill's partners were concerned that it had previously been used as a uranium mill site. App. 126. The Mill determined that the 25 acre mill yard parcel was safe for unrestricted use, relying on the information regarding the decontamination and license termination found in CDOH's files when it made the decision to purchase the property. Based on its review of the information in those files, which indicated that the mill yard parcel was decontaminated and safe for unrestricted use, The Mill purchased the property from Colorado Ventures in July 1973. App. 138-139.

In 1978, Congress enacted the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 (Nov. 8, 1978) (codified at 42 U.S.C. §§ 7901-7942 (1988)) ("UMTRCA"). The Mill's property was included in a list of proposed cleanup sites specified for action under UMTRCA, and The Mill's property became a "candidate for remedial action." App. 128. In 1979, Colorado adopted legislation to carry out UMTRCA. *See* Radiation Control Act, ch. 269, § 1, 1979 Colo. Sess. Laws 1069 (codified at C.R.S. §§ 25-11-301 to 305 (Repl. vol. 11A 1989)). In 1980, the United States Department of Energy ("DOE") and CDOH entered into a Cooperative Agreement to carry out UMTRCA on the processing sites located in Colorado. App. 174. In 1981, DOE and The Mill entered into a limited use agreement for radiation testing only on the 35 acre tailings pile. In 1982, CDOH and DOE

performed a radiation survey on the tailings pile and also, without The Mill's permission, on the mill yard. App. 56, 129-131.

In February 1983, The Mill leased the mill yard to O.C. Coal Company ("O.C. Coal") for $7,000 per month. The Mill then notified CDOH of this lease. App. 129. In response to that notice, CDOH issued a series of restrictive letters and communications[3] which, taken together, prohibited The Mill from using the mill yard for any economically viable purpose. App. 129, 142. Although the mill yard had been released from licensure and its use declared unrestricted, CDOH had been and was continuing to issue use restrictions. CDOH's letter of March 4, 1983, begins these further restrictions by referring to "*existing* mill yard radioactive contamination". These letters and communications continued, some falsely stating that the mill yard was still under licensure by CDOH. App. 129-130.

CDOH restricted the use of the mill building to only those limited portions of the building floor covered by concrete pads. CDOH restricted the use of the mill building and the entire mill yard until The Mill had constructed certain improvements to align with CDOH's regulations. CDOH prohibited O.C. Coal from any storage other than as expressly authorized by CDOH without decontamination and survey. CDOH also restricted the use of any portion of the mill yard outside the

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[3] CDOH did not undertake any formal administrative or legal actions to enjoin The Mill's use of the mill yard or relicense the mill yard. App. 4-5; *cf.* C.R.S. § 25-11-107 (Repl. vol. 11A 1989).

building to a 50-foot strip along the eastern edge of the property, and prohibited The Mill from constructing any new buildings on the mill yard parcel. App. 95-96.

The restrictions on the mill yard had a direct impact on the O.C. Coal lease. App. 130. Because of the numerous and ambiguous restrictions CDOH placed on the use of the property, O.C. Coal terminated its lease with The Mill in May 1984. In 1985, after O.C. Coal had terminated its lease, The Mill flatly asked CDOH what The Mill could do with its property. CDOH's answer was "not perfectly clear and easily understood" by The Mill. App. 130. Since then, The Mill has been able to put the property to no viable economic use as a result of the restrictions imposed by CDOH.[4] App. 142.

In January 1986, The Mill filed suit against CDOH alleging inverse condemnation, regulatory taking and estoppel claims resulting from CDOH's regulation of the mill yard. After a trial on The Mill's regulatory taking claim[5] in March 1987, Judge H. Jeffrey Bayless found that CDOH had effected a temporary regulatory taking of The Mill's property and awarded The Mill lost use damages

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[4] In the trial on The Mill's regulatory taking claims, the Denver District Court found that the property was contaminated to such an extent that it was unfit for general public access. Prior to that trial, The Mill was able to earn only between $500 and $700 per month in rent from storage, less than the property taxes during that time which were over $5,000 per year. App. 142.

[5] The Denver court dismissed The Mill's inverse condemnation claim before trial, holding that CDOH could not have inversely condemned The Mill's property because it did not have statutory condemnation authority until May 1986.

for a period until, as Judge Bayless reasoned, DOE would remediate and return The Mill's property under UMTRCA.

On appeal, the Colorado Court of Appeals reversed the Denver court's decision to dismiss The Mill's inverse condemnation claim before trial. App. 109. The Colorado Supreme Court granted certiorari and reversed. App. 93. Justice Mullarkey, disagreeing with the Eleventh Circuit in *Fountain v. Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038 (11th Cir. 1982), held that a state agency which does not have the power of eminent domain cannot inversely condemn property, App. 99, but nevertheless concluded that The Mill could seek damages for a regulatory taking, and remanded the case to the Court of Appeals for further review, App. 105-109.

In 1989, while The Mill's case was on appeal, CDOH commenced an eminent domain proceeding in the Gunnison County District Court to occupy The Mill's property for periods of three, and then ten, weeks to allow DOE to conduct radiation and other tests on the property. In 1990, DOE concluded that remedial action was needed for the entire 61 acres, not just the 35 acre tailings pile. DOE then directed CDOH to acquire The Mill's entire 61 acres in fee simple.

CDOH then sought and obtained leave to amend its condemnation petition to acquire The Mill's entire 61 acres in fee. In November 1990, CDOH and The Mill stipulated, in lieu of an immediate possession hearing

before the Gunnison court, that in its contaminated condition The Mill's property had a zero fair market value.[6] In April 1991, on a summary judgment motion by CDOH and over The Mill's objection, the Gunnison court entered a Rule and Order vesting title to The Mill's property in CDOH with a zero condemnation award. App 120.

The Mill appealed the eminent domain proceeding and that appeal was consolidated with the remand appeal of The Mill's regulatory taking case. App. 77. Subsequently, the Court of Appeals reversed the Gunnison court's Rule and Order in the eminent domain proceeding, holding that the provisions and intent of UMTRCA, as well as equal protection concerns, required that property taken under UMTRCA be valued in its decontaminated condition. App. 77. On rehearing, the Court of Appeals entered a modified opinion which, in addition to deciding the proper value of The Mill's land in the eminent domain proceeding, affirmed the Denver court's finding in The Mill's regulatory taking case that CDOH had effected a regulatory taking of The Mill's property in May 1984, to establish the valuation date of The Mill's land in the eminent domain proceeding, and awarded The Mill prejudgment interest from that date. App. 52.

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[6] Before CDOH commenced the condemnation of The Mill's property, the Colorado Court of Appeals held, in *Department of Health v. Hecla Mining Company*, 781 P.2d 122 (Colo. Ct. App. 1989) (*cert. denied*), that in a condemnation proceeding brought pursuant to UMTRCA, Colorado's common law rule against enhancement precluded the property owner from introducing evidence of the decontaminated fair market value of the property. In *Hecla*, as here, the remediation cost far exceeded the property's decontaminated fair market value.

On certiorari, the Colorado Supreme Court reversed both aspects of the Court of Appeals's decision. App. 1. Writing for the majority, Justice Mullarkey held that The Mill did not have reasonable investment-backed expectations for its property, and therefore CDOH's actions could not have effected a taking. App. 7-17. Justice Mullarkey also concluded that Colorado's statutory rule against enhancement prohibited The Mill from recovering the decontaminated fair market value of its land, on the premise that UMTRCA did not intend this "windfall profit." App. 17-30. Justice Scott dissented from the majority, arguing that Judge Bayless had found as a matter of fact that The Mill did purchase its property with reasonable investment-backed expectations. App. 38-51.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari, the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals. Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari, the circumstance when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I.

THIS CASE PRESENTS AN IMPORTANT BUT UNSETTLED QUESTION – WHEN DOES THE FIFTH AMENDMENT REQUIRE THAT JUST COMPENSATION NOT BE MEASURED STRICTLY BY THE FAIR MARKET VALUE OF THE LAND TAKEN?

The Mill received a zero condemnation award in an eminent domain proceeding brought by CDOH pursuant to UMTRCA, even though the United States was obligated to perform remedial action on The Mill's property at no cost to The Mill, whether or not the United States allowed The Mill to keep its land. By affirming that award, the decision below illustrates the extreme inequity of Colorado's rule that a property owner cannot receive any enhancement in the value of his property due to the public improvement for which the property is taken. In this case, "just compensation" requires that Colorado depart from its general rule against enhancement.

CDOH condemned The Mill's property pursuant to authority granted in Colorado's Radiation Control Act. *See* C.R.S. § 25-11-303(d)(III) (Repl. vol. 11A 1989). In relevant part, the Act provides:

> [CDOH] is authorized to obtain [a designated UMTRCA processing] site by condemnation proceedings pursuant to the provisions of article 1 of title 38, C.R.S. A decision made pursuant to the provisions of article 1 of title 38, C.R.S., shall be made in accordance with the criteria established in section 24-56-117(1)(c), C.R.S., *and the provisions of [UMTRCA].*

C.R.S. § 25-11-303(d)(III) (Repl. vol. 11A 1989) (emphasis added).

Because a § 303(d)(III) condemnation is brought at DOE's behest for UMTRCA purposes, and involves federal funds, the Act requires that the court decide the property's value "in accordance with the criteria established in [C.R.S. § 24-56-117(1)(c) (Repl. vol. 10A 1988) (codifying Colorado's common law rule against enhancement)] and the provisions of [UMTRCA]." Applying *Hecla*, *see* 781 P.2d at 122, the Gunnison court concluded that § 24-56-117(1)(c) prohibited any evidence of the decontaminated value of The Mill's land. App. 57-66. Since The Mill and CDOH had stipulated, in lieu of an immediate possession hearing, *see* C.R.S. § 38-1-105(6)(a) (Repl. vol. 16A 1982), that the *contaminated* value of The Mill's land was zero, the Gunnison trial court summarily vested title in CDOH.[7] App. 120.

The Colorado Supreme Court affirmed the zero award in CDOH's UMTRCA condemnation proceeding against The Mill. This case was the second UMTRCA condemnation in Colorado which amounted to a zero award. App. 19, n.11; *see Hecla*, 781 P.2d at 122. Writing for the majority, Justice Mullarkey considered whether the Supremacy Clause required Colorado to follow the provisions of UMTRCA, rather than state law, "begin[ning] by assuming that the historic police powers of the state are not to be superseded by any federal

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[7] After CDOH obtained possession of The Mill's land in December 1990, the only issue remaining for trial in the condemnation case was the value of the land taken, *see* C.R.S. § 38-1-114 (Repl. vol. 16A Supp. 1994), which was determined by *Hecla*. App. 57-59.

laws or regulations unless that congressional purpose is clearly shown." App. 21. The court below concluded that the state's rule against enhancement in value by reason of the public improvement, C.R.S. § 24-56-117(1)(c), was not inconsistent with UMTRCA, and that UMTRCA did not require Colorado to deviate from its general rule. App. 26-27, 30. Following that preemption analysis, the court determined that The Mill was not entitled to recover the decontaminated fair market value of its property, i.e., that The Mill was entitled to receive nothing for the loss of 61 acres of improved land.

The question of what compensation is "just" begins with the Fifth Amendment. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). "The Fifth Amendment . . . provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 279-280, 87 L.Ed. 336 (1943). "However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, [this Court has] recognized the need for a relatively objective working rule." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-11, 99 S.Ct. 1854, 1857, 60 L.Ed.2d 435 (1979) (citations omitted). "The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled

to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." *564.54 Acres*, 441 U.S. at 511 (citations omitted).

"Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, [this] Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property." *564.54 Acres*, 441 U.S. at 511. While recognizing the "need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation." *564.54 Acres*, 441 U.S. at 512; *see United States v. Commodities Trading Corp.*, 339 U.S. 121, 70 S.Ct. 547, 94 L.Ed. 707 (1950). "This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards." *Commodities Trading*, 339 U.S. at 123; *see United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S.Ct. 451, 454-55, 83 L.Ed.2d 376 (1984); *Alamota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 478, 93 S.Ct. 791, 797, 35 L.Ed.2d 1 (1973) ("The constitutional requirement of just compensation derives as much content from the basic principles of fairness as it does from technical concepts of property law.") (citations omitted). On those occasions when equity and fairness dictate, this Court has not confined itself to strictly applying the

market value standard to determine just compensation. *E.g., United States v. General Motors*, 323 U.S. at 373. This case merits precisely such a deviation to fully compensate The Mill for the loss of its land.

Congress enacted UMTRCA to "protect the public health and safety and the environment from hazards associated with wastes from the uranium or milling process," H.R. Rep. No. 1480, 95th Cong., 2d Sess., pt. 1, at 6, 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7433, 7435, at the cost of the nine involved states and the federal government, *id.* at 14, *reprinted in* 1978 U.S.C.C.A.N. 7433, 7436. In UMTRCA, "Congress finds that uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and . . . that every reasonable effort [should] be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings." 42 U.S.C. § 7901(a) (1988). UMTRCA's primary purpose is "to provide . . . in cooperation with the interested States . . . and the persons who own or control inactive mill tailings sites, a program of assessment and remedial action at such sites . . . in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public." 42 U.S.C. § 7901(b) (1988).

UMTRCA requires DOE to "complete remedial action" at twenty-two separate "processing sites" located in nine states, including The Mill's property in Gunnison, Colorado. 42 U.S.C. § 7912(a)(1) (1988). The United States pays ninety percent of the cost of performing remedial actions under UMTRCA, including acquisition costs, and the state pays ten percent. 42 U.S.C. § 7917(a) (1988). To

accomplish the required remedial action, DOE is "authorized to enter into cooperative agreements with [the host states] to perform remedial actions at each designated processing site." 42 U.S.C. § 7913(a) (1988). The cooperative agreement between DOE and the state must "require the State where determined appropriate by [DOE], to acquire any designated processing site." 42 U.S.C. § 7914(a) (1988). "In determining whether to require the State to acquire a designated processing site," UMTRCA admonishes that "consideration shall be given to the prevention to windfall profits." 42 U.S.C. § 7914(a). Despite Congress's direction to consider "windfall profits," UMTRCA does not define the term, either within the statute or the legislative history which accompanied it. *See* 42 U.S.C. § 7911 (1988); H.R. Rep. No. 1480, pt. 2, at 37, *reprinted in* 1978 U.S.C.C.A.N. at 7433, 7464. UMTRCA also omits any means to determine the appropriate acquisition cost for a processing site. *See* 42 U.S.C. § 7914 (1988).

UMTRCA does not require ownership of a site to perform remedial action. Under the cooperative agreement, DOE may elect to require the state to obtain written consent from the owner to perform the remedial action, 42 U.S.C. § 7913(c)(1) (1988), or may direct the state to acquire the property in fee or some lesser interest[8], 42 U.S.C. § 7914(a) (1988). Congress did not require DOE to

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[8] Despite Justice Mullarkey's suggestion that prevention of "windfall profits" is the sole factor used by DOE to determine whether to acquire a processing site, App. 22, § 7914 allows DOE virtually unbridled discretion in making its decision, *see* 42 U.S.C. § 7914.

simply acquire all designated processing sites, as it might have done, *see* 42 U.S.C. § 7914(b)(1) (1988) (requiring DOE and the state to acquire sites used for the permanent disposal of "residual radioactive materials"), or adopt a specific rule for determining the value of a particular site. Likewise, Congress did not adopt a statutory rule against enhancement for valuing UMTRCA sites, although it has done so elsewhere, *see United States v. Cors*, 337 U.S. 325, 327, n.1, 69 S.Ct. 1086, 1088, 93 L.Ed. 1392 (1949) (interpreting the Merchant Marine Act of 1936).

Congress characterized UMTRCA as a largely "voluntary" program, assuming that property owners would ordinarily agree to allow DOE to perform remedial action. *E.g.*, H.R. Rep. No. 1480, pt. 2, at 38, *reprinted in* 1978 U.S.C.C.A.N. at 7433, 7465. At the same time, Congress authorized DOE to direct its "cooperative" state to acquire any or all designated processing sites. 42 U.S.C. § 7914(a). For property not acquired, the state and DOE return the property after remedial action is complete. *See* 42 U.S.C. § 7913 (1988). Where the cooperative state has acquired a processing site, unless DOE must take title to the property under § 7914(b), after DOE has completed remedial action the cooperative state may retain the property for public purposes, transfer the property to the United States or sell the property on the open market. 42 U.S.C. § 7914(e)(1) (1988). However, "[b]efore offering for sale [any land within a] processing site, the State [must] offer to sell such land[ ] . . . at [its] fair market value to the person from whom the State acquired [it]." 42 U.S.C. § 7914(e)(2).

The court below reviewed these provisions of UMTRCA and its legislative history, and found that

UMTRCA is "fully consistent" with Colorado's statutory rule against enhancement. App. 30. Contrary to the court's analysis, the Fifth Amendment, and not the Supremacy Clause, properly determines what compensation is "just." Congress's intent, evident in UMTRCA, frames the question of what the Fifth Amendment requires when a processing site is condemned at DOE's behest. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 416, 100 S.Ct. 2716, 2741, 65 L.Ed.2d 844 (1980). Congress has legislated compensation beyond the minimum required by the Fifth Amendment, *United States v. 50 Acres*, 469, U.S. at 24, 31, n.14, but Congress did not expressly articulate the measure of compensation in UMTRCA, *see* 42 U.S.C. § 7914(a).

Congress's intent appears in the provisions of UMTRCA. Overriding all else is that DOE must perform remedial action at each designated processing site. 42 U.S.C. § 7912(a)(1). Nearly equal in importance is that DOE and the cooperative state must bear the entire cost of that remedial action. 42 U.S.C. § 7917 (1988). UMTRCA permits DOE to clean up a processing site and return it to the owner, or direct the state to acquire the site before DOE performs remedial action. 42 U.S.C. § 7913; 42 U.S.C. § 7914(a). After DOE has completed its remedial action, the state may sell the property if the state first offers it to the person from whom the state acquired the property at its then, i.e., decontaminated, fair market value. 42 U.S.C. § 7914(e)(2).

In the ordinary case, remedial action cost will far exceed the decontaminated fair market value of the land. *See Hecla*, 781 P.2d at 122. Thus, UMTRCA squarely raises the question of when the measure of compensation must

depart from the ordinary rule, i.e., fair market value determined as of the date of taking, *United States v. 50 Acres*, 469 U.S. at 24, to pay the owner what is just and equitable for his property. UMTRCA does not present the ordinary condemnation case in which the government takes property to build a road or establish a park, i.e., for a public improvement; in an UMTRCA condemnation, the government takes the land for a public purpose. App. 64. Under UMTRCA, the United States must perform remedial action at each designated processing site, whether or not it keeps the property. Unlike the typical government condemnation, the benefit UMTRCA bestows on the property owner, i.e., the remedial action, cannot be considered an enhancement in the value of his land resulting from the project, because DOE must perform this remedial action whether or not the state acquires the processing site. Justice Mullarkey hypothesizes that a case could exist in which the property owner might receive a positive value for a contaminated site, App. 18-19, n.11; anything is possible, but Congress assumed this would not be the case, *see* H.R. Rep. No. 1480, pt. 2, at 34, *reprinted in* 1978 U.S.C.A.A.N. at 7433, 7461. DOE estimated the cost of remedial action for The Mill's property at $40,000,000, App. 34, n.16, but its decontaminated fair market value may not exceed $3,000,000.

UMTRCA demonstrates the injustice of applying an inviolate rule against enhancement. If DOE obtains consent, DOE will perform remedial action at no cost to the owner and return the property in a decontaminated condition. If DOE directs the state to acquire the property, the owner receives nothing if the property is valued in its contaminated condition. Should the state elect to sell the

property, the owner then has the "option" to purchase the property at its decontaminated fair market value. Therefore, in order to obtain what a "consent" property owner otherwise receives, the "condemned" property owner must subsidize at least part of DOE's remedial action cost, in spite of UMTRCA's explicit direction that the property owner bear none of the cleanup cost.

Few cases may compel a departure from the general rule requiring payment of the strict fair market value. *See United States v. 50 Acres*, 469 U.S. at 24 (rejecting, without statutory guidance, the "substitute facilities doctrine"). The Mill does not suggest that it should receive some completely different measure; rather, the Fifth Amendment simply requires that the cost to perform remedial action must be ignored in determining the fair market value that otherwise would be paid for the property were it not for the existing radioactive contamination. Although it might be the rare case, the Fifth Amendment requires deviation from the fair market value rule where the owner cannot otherwise be put in as good a position as if his property not been taken.

II.

THIS CASE PRESENTS AN IMPORTANT QUESTION – WHEN DOES A STATE'S REGULATION OF LAND SO INTERFERE WITH REASONABLE INVESTMENT-BACKED EXPECTATIONS THAT IT EFFECTS A COMPENSABLE TAKING?

Less than two months before this Court decided *First English*, Judge Bayless found that CDOH had effected a temporary regulatory taking of part, i.e., the 25 acre mill

yard, of The Mill's 61 acre parcel. On appeal, the Colorado Supreme Court reversed, and ignoring its obligation to respect facts found by the trial court, *e.g., M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380 (Colo. 1994), held that The Mill's investment-backed expectations for its property were so "highly unreasonable" that no compensable taking occurred, App. 21.

If allowed to stand, the decision below invites states to regulate land without restraint to prevent landowners from forming expectations about land use. This Court should take this opportunity to decide whether, if an owner forms reasonable investment-backed expectations by purchasing land in reliance on the state's prior termination of specific regulations which restricted use of that land, the state destroys those expectations if it subsequently resurrects those restrictions to prohibit all economically viable use of that land, a question this Court left open in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2894, n.7, 120 L.Ed.2d 798 (1992).

The court below holds as a matter of law that The Mill lacked reasonable investment-backed expectations for its property. App. 21. Writing for the majority, Justice Mullarkey offers two separate reasons for the court's conclusion. First, by virtue of the license restrictions which had encumbered the entire 61 acres before CDOH terminated license no. SUA-809 and the state's existing regulations governing radiation, The Mill was on "notice" of the state's regulatory authority over not only the tailings pile but also the mill yard. App. 10-14. Second, The Mill could not "reasonably expect to put [its] property to a use that constitute[d] a nuisance, even if that [was] the only economically viable use for the property." App. 14.

In his dissent, Justice Scott argues that "[a]t the time The Mill purchased the land in 1973, the contemplated use of the land (storage) was not proscribed by any rules or understanding that existed at that time. The anticipated investment-backed use of The Mill property was not unlawful, since the state had itself declared the property authorized for unrestricted use." App. 43. Justice Scott questions the court's conclusion that, as a result of the prior regulations imposed on radioactive materials, The Mill's land could be regulated as personalty. App. 45-47. Finally, Justice Scott takes aim squarely at the conclusion that background nuisance principles could preclude The Mill's use of its land, because the "majority's observation fails to fairly take into account two important realities: (1) in 1973, the extent of the potential hazards posed by radiation was not fully understood; and (2) The Mill had no knowledge of the site's contamination at the time of its purchase due to its reliance upon [CDOH] findings that the mill yard was uncontaminated and available for uses contemplated by The Mill." App. 48-49. Justice Scott also points out that

> [i]n the nuisance cases relied on by the majority, it was the conduct of the owner of the property that caused the nuisance, not the character of the property itself, over which the owner had no control. In the case at bar, however, The Mill is not putting its property to any noxious use at all – it is merely using it as a storage facility. The Mill is not engaging in any act that makes the property itself dangerous; the property is already dangerous because it is contaminated with radiation.

App. 44, n.21.

In deciding that The Mill did not suffer even a partial regulatory taking of its property, the court below not only misapplies *Lucas* but also improperly extrapolates the significance of this Court's commercial cases, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). The court's decision also conflicts with the land-use cases decided by the Federal Circuit. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

"It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English*, 482 U.S. at 318-319 (citing *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)). "Justice Holmes recognized in [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)], . . . that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 112 S.Ct. at 2892. "Nevertheless, . . . *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment. In 70-odd years of succeeding 'regulatory takings' jurisprudence, [this Court has] generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.' " *Lucas*, 112 S.Ct. at 2893 (citations omitted). This Court has "however,

described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. . . . The second situation in which [this Court has] found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas*, 112 S.Ct. at 2893 (citations omitted).

Without the benefit of this Court's "categorical treatment," the Denver trial court balanced the public and private interests involved, *see Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), and found that by restricting The Mill's use of the mill yard CDOH had effected a regulatory taking. App. 135-140. In so doing, the court found as a matter of fact that CDOH's actions had deprived The Mill of all economically beneficial use of the mill yard. App. 142. Despite this finding, the court below concluded instead that the categorical treatment approved in *Lucas* was inappropriate and applied the multi-factored approach described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The majority's analysis demonstrates that the "rhetorical force of [this Court's] 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 112 S.Ct. at 2894, n.7. The Mill's regulatory taking claim concerned less than all of its land; perhaps for this reason, the court below ignored the "categorical treatment" when regulation has prohibited all economically viable

land use, *Lucas*, 112 S.Ct. at 2893. Although *Lucas* does not reach the question this case presents, 112 S.Ct. at 2894, n.7, the Federal Circuit's answer to that question is inconsistent with the decision below.

"Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." *Florida Rock*, 18 F.3d at 1568 (emphasis in original). Even if categorical treatment would be inappropriate because less than all of The Mill's property was affected by CDOH's regulations, the court below nevertheless should have concluded that the economic impact of CDOH's regulation of only the affected land could – and did – result in a taking. *See Florida Rock*, 18 F.3d at 1568-1570; *see also Loveladies Harbor*, 28 F.3d at 1180-1181 (addressing the "denominator" question identified in *Lucas*, 112 S.Ct. at 2894, n.7).

Instead, the court below focused on the reasonableness of The Mill's investment-backed expectations and ended its inquiry there. The court below relies on *Golden Pacific Bancorp v. United States*, 15 F.3d 1066 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 420 (1994), and the common law of public nuisance (presumably as it existed when The Mill purchased its land in 1973). However, in applying *Monsanto* to regulations governing land use, the Colorado Supreme Court's decision conflicts with the Federal Circuit's decisions in *Loveladies Harbor* and *Florida Rock*. The Federal Circuit holds:

> Marketplace decisions should be made under the working assumption that the Government will neither prejudice private citizens, unfairly shifting the burden of a public good onto a few people, nor act arbitrarily or capriciously, that is, will not act to disappoint reasonable investment-backed expectations. The Government, in a word, must act fairly and reasonably, so that private parties can pursue their interests.

Florida Rock, 18 F.3d at 1571; *see Loveladies Harbor*, 28 F.3d at 1177 (requiring knowledge of the restraint at the time of purchase); *cf. City and County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 297 (1957) (municipality was estopped to deny the validity of a building permit issued in violation of applicable zoning after owner started construction in reliance on permit). In *Loveladies Harbor*, the court notes that testing "interference with distinct investment-backed expectations [is] a way of limiting takings recoveries to owners who [can] demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor*, 28 F.3d at 1177; *see also Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994) (despite prior regulation, trial court order enjoining the regulation resurrected the landowner's reasonable expectation regarding the value and use of land). These Federal Circuit cases support a conclusion opposite that reached by the Colorado Supreme Court, because CDOH had terminated the license on the mill yard nearly two years before The Mill purchased its land.

The court below also decided that The Mill did not have reasonable investment-backed expectations for the mill yard because nuisance law could have prevented any

use of the entire property. App. 14-17. The court's rationale suffers from two serious flaws. First, the court has engrafted the *Lucas* "nuisance" exception onto the determination of the landowner's reasonable expectations at the time of purchase. As the decision below demonstrates, nuisance law can be used to impute to the landowner knowledge of the limits on land use at the time he acquires title. Even if *Lucas* does not logically prohibit this type of analysis in cases involving partial regulatory taking, *see* 112 S.Ct. at 2894, n.7, the court below has improperly assessed the burden of proof against the property owner. This approach flies in the face of *Lucas*, 112 S.Ct. at 2901-02, and the Federal Circuit's treatment in *Loveladies Harbor*. As Judge Plager points out, "Loveladies [did not have] the opportunity to decide, at the beginning, whether its investment backed expectations could be realized under the regulatory environment the state later attempted to impose." *Loveladies*, 28 F.3d at 1178.

Second, the court below fails to present an "objectively reasonable application" of common law nuisance,[9] *see Lucas*, 112 S.Ct. at 2902, n.18, at least prior to its decision in this case. Justice Mullarkey concedes that common law nuisance redresses only injuries to persons or property outside the owner's land, but nevertheless finds that The Mill could have been prevented from using

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[9] *Moore v. Standard Paint & Glass Co.*, 145 Colo. 151, 155, 358 P.2d 33, 36 (1960), cited by the majority below, is a premises liability case. The court there holds that an "occupier of land owes a duty of reasonable care to prevent activities and conditions on his land from injuring persons or property outside his land. . . . " *Standard Paint*, 145 Colo. at 155.

the mill yard, apparently for any purpose. App. 16. Justice Mullarkey reaches this conclusion even though the trial court specifically found that The Mill's use of its property did not harm any persons or property outside its property. Rather, as the dissent points out, the land itself was poisoned by uranium milling which stopped long before The Mill purchased the land. App. 44, n.21.

Once CDOH had delicensed the mill yard and declared it safe for unrestricted use, nothing in CDOH's official files or the statements of CDOH officials "reflected a considered determination that certain defined activities would violate [Colorado's] understanding of its nuisance powers," *Loveladies Harbor*, 28 F.3d at 1183. A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his land. *E.g., Allison v. Smith*, 695 P.2d 791 (Colo. Ct. App. 1984). A public nuisance is "the doing of or failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public." *Echave v. City of Grand Junction*, 118 Colo. 165, 193 P.2d 277 (1948); *cf.* C.R.S. § 16-13-305 (Repl. vol. 8A 1986) (defining criminal public nuisance). Had The Mill, for example, decided to clean up the tailings pile by moving it to an adjacent owner's property, nuisance law would certainly have prevented that activity. *E.g., Wilmore v. Chain O'Mines, Inc.*, 96 Colo. 319, 44 P.2d 1024 (1935) (mine owner admitted dumping tailings into stream). However, this hypothetical situation did not occur.

At the time The Mill purchased its land in 1973, all milling operations had long since ended. After The Mill took possession of the land, The Mill never used it to

spread radioactive contamination or pollute other property. App. 17, n.9. Despite this, CDOH's regulations prohibited The Mill not only from using the mill yard for anything other than some limited storage but also from constructing any new buildings in the mill yard. The practical effect of CDOH's regulations was to restrict both an essential use of The Mill's land, *see Lucas*, 112 S.Ct. at 2901 (noting that it "seems unlikely that common-law principles would . . . prevent[ ] the erection of any habitable or productive improvements on . . . land; they rarely support prohibition of the 'essential use' of land") (citation omitted), and The Mill's own entry to the mill yard, an interference tantamount to requiring public access, *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987) (right to exclude others is an "essential stick[ ] in the bundle of rights that are commonly characterized as property"). Although CDOH may have been delegated broad statutory authority to regulate radioactive materials, *see* C.R.S. § 25-11-103 (Repl. vol. 11A 1989), no "background" principles of nuisance law could restrict The Mill's use of its land to the extent CDOH did by regulating access to and use of the mill yard, *cf. Allison v. Smith*, 695 P.2d at 791 (accumulation of trash and debris substantially interfered with use of neighbor's property). However, CDOH delicensed the mill yard and declared it safe for unrestricted use, and left only the "background principles" of nuisance law to govern The Mill's activities.

The Mill was entitled to rely on CDOH's delicensing of the mill yard before The Mill purchased the land in 1973. When CDOH later exercised its enforcement authority over The Mill and its property, those actions

prevented The Mill from using the mill yard for any economically viable purpose, with the same force as if CDOH had undertaken formal proceedings. As the trial court concluded, The Mill should not be singled out to bear the cost of CDOH's actions in delicensing and then, as a practical matter, "relicensing" the mill yard.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner

APPENDIX A

SUPREME COURT,
STATE OF COLORADO
NO. 93SC418

DECEMBER 19, 1994

STATE OF COLORADO,
DEPARTMENT OF HEALTH, Petitioner,

v.

THE MILL,
a limited partnership, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT REVERSED AND
CASE REMANDED WITH DIRECTIONS

STATE of Colorado, DEPARTMENT OF HEALTH, Petitioner,

v.

THE MILL, a limited partnership, Respondent.

No. 93SC418.

Supreme Court of Colorado,
En Banc.

Dec. 19, 1994.
Rehearing Denied Jan. 17, 1995.

Owner of uranium-contaminated mill site brought action against Department of Health alleging inverse condemnation and regulatory taking. The District Court of the City and County of Denver, H. Jeffrey Bayless, J., awarded owner damages for temporary regulatory taking

but dismissed claim for inverse condemnation. Department appealed, and the Court of Appeals reversed and remanded, 787 P.2d 176. Owner's petition for certiorari was granted, and the Supreme Court reversed and remanded, 809 P.2d 434. On remand, case was consolidated with owner's appeal of order of the District Court, Gunnison County, Thomas J. Goldsmith, J., condemning property under Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). The Court of Appeals reversed and remanded, 868 P.2d 1099. Certiorari was granted, and the Supreme Court, Mullarkey, J., held that: (1) any investment-backed expectations of unregulated use of site by owner were unreasonable so that regulation did not constitute taking; (2) application of rule against enhanced value was not preempted by federal statute; and (3) application of rule against enhanced value did not violate equal protection clause.

Reversed and remanded with directions.

Erickson, J., concurred specially and filed opinion.

Scott, J., dissented and filed opinion.

Gale A. Norton, Atty. Gen.
Stephen K. ErkenBrack, Chief Deputy Atty. Gen.
Timothy M. Tymkovich, Sol. Gen.
Jerry W. Goad, First Asst. Atty. Gen.,
Natural Resources Section
Denver, for Petitioner

Holley, Albertson & Polk, P.C.
George Alan Holley,
Eric E. Torgersen,
Denver, for Respondent

JUSTICE MULLARKEY delivered the Opinion of the Court.

This case is a consolidation of two cases. The first was a regulatory taking action initially brought by respondent, The Mill, against petitioner, the Colorado Department of Health (CDH). While that case was pending in the court of appeals, it was consolidated with an appeal by The Mill in an eminent domain action brought by CDH pursuant to the federal Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 U.S.C. sections 7901 to 7942 (1988), and the corresponding state statute, sections 25-11-301 to -305, 11A C.R.S. (1989).

In the regulatory taking action, the court of appeals upheld the trial court. It ruled that use limitations recommended by CDH in correspondence with the Mill during 1983 constituted a total regulatory taking and remanded for a new determination of just compensation. *The Mill v. State of Colorado, Department of Health,* 868 P.2d 1099 (Colo.App.1993). In the eminent domain action, the court reversed the trial court and held that Colorado's rule against enhanced value[1] did not apply in condemnation actions under UMTRCA and that evidence of the decontaminated value of the Mill's property must be admitted in order to determine its fair market value. *Id.* For the reasons discussed below, we reverse the court of appeals' rulings on both issues and remand with directions.

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[1] *See Williams v. City & County of Denver,* 147 Colo. 195, 198-202, 363 P.2d 171, 173-75 (1961); § 24-56-117(1)(c), 10B C.R.S. (1988).

I.

The property at issue in this case is a 61-acre parcel on which uranium milling operations were once conducted pursuant to an Atomic Energy Commission (AEC) license. Thirty-six acres of the property were covered by uranium mill tailings. The remaining twenty-five acres were used as the mill yard. After milling operations ceased, the property was used as an uranium mill tailings disposal site, also pursuant to an AEC license. In 1968, the AEC delegated authority to the State of Colorado to regulate radioactive materials and jurisdiction over the AEC license was transferred to the state. Then, in 1971, the state terminated the license. The tailings pile remained subject to state uranium mill tailings regulations. In 1973, after reviewing the available state records,[2] The Mill purchased the entire 61-acre parcel. From 1973 to 1983 the site was used for storage. During this time, CDH actively monitored The Mill's maintenance of the tailings pile and the condition of the mill yard.

In 1978, Congress passed the Uranium Mill Tailings Radiation Control Act. UMTRCA mandated the designation and clean up of uranium processing sites. Pursuant

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[2] The stipulated facts submitted to the trial court stated that, due to termination of the license, the mill yard was authorized for unrestricted use. Trial testimony and documents taken from CDH files indicate only that the mill structure was decontaminated "to acceptable levels for transfer not requiring licensure" and that the AEC license number SUA-809 was terminated. That license authorized "possession, storage, and decontamination only of the contaminated equipment and buildings constituting the Gunnison uranium mill," and transfer of certain mill equipment.

to UMTRCA, the entire 61-acre parcel belonging to The Mill was designated as a uranium processing site. In 1980, testing on the entire parcel indicated that contamination existed in both the tailings pile and the mill yard sufficient to qualify the site for clean up under UMTRCA.

In 1983, The Mill leased the mill yard to O.C. Coal Company for $7,000 per month for coal storage. The Mill notified CDH of the lease and CDH met on March 11, 1983, with both parties to discuss certain precautions to avoid the spread of radioactive contamination from the property. The agreed-upon precautions were confirmed in letters sent by CDH to The Mill and O.C. Coal Company on March 15, 1983. These precautions limited the area available for storage to those portions of the property where contaminated soils would not mix with the coal. On July 15, 1983, CDH sent The Mill a summary of a routine inspection which indicated non-compliance with CDH tailings regulations including failure to post warning signs on the property, no gates to secure the tailings pile, and signs of horses grazing on the piles. In addition, CDH notified The Mill that coal had been stored contrary to the terms of the agreement documented in the March 15 letter. These letters are the basis for the alleged regulatory taking.

O.C. Coal prematurely terminated its lease in May 1984. After that time, under the use restrictions urged by CDH, the income from the mill yard fell to between $500 and $700 per month. The Mill argues that this was not a reasonable economic return on the property.

In 1986, The Mill filed an action against CDH claiming that, because of the restrictions placed on the use of

the mill yard, the property could not be put to any reasonable economic use. The Mill pled as grounds for relief inverse condemnation, regulatory taking, and estoppel. The trial court dismissed the inverse condemnation claim but found that the state had effected a regulatory taking and awarded $200,000 to The Mill in lost-use value during the period necessary for decontamination. On appeal, the court of appeals reversed the dismissal of the inverse condemnation claim and held that all other claims were subsumed in the inverse condemnation claim. *The Mill v. Department of Health*, 787 P.2d 176 (Colo. App. 1989) (*The Mill I*). This court reversed the court of appeals' decision and remanded the case for consideration of The Mill's regulatory taking and estoppel claims. *Department of Health v. The Mill*, 809 P.2d 434 (Colo. 1991) (*The Mill II*).

While those issues were on appeal, CDH filed an action to condemn The Mill's property under section 25-11-303(1)(d), 11A C.R.S. (1989). In this action, the parties stipulated that the market value of the property in its contaminated state was zero, and the trial court entered a judgment vesting title to the property in the state. The Mill appealed the judgment. The condemnation action and the regulatory taking action were consolidated for consideration by the court of appeals.

In the consolidated action, the court of appeals found that both The Mill's regulatory taking and estoppel claims were "subsumed" in its disposition of the eminent domain proceeding because the monetary award arising from any of the claims could not exceed the fair market value of the property. The court found that the regulatory taking issue was relevant to the eminent domain action

only as it determined at what point the property was taken. The court (1) affirmed the trial court's ruling that there had been a regulatory taking; (2) *sua sponte* set aside the stipulation of zero value on grounds that, for purposes of condemnation pursuant to UMTRCA, fair market value must take into account the decontaminated value of the property; and (3) remanded for a new determination of just compensation. *The Mill v. Department of Health,* 868 P.2d 1099, 1105 (Colo. App. 1993) (*The Mill III*). CDH petitioned for review and we granted certiorari to review both the regulatory taking and eminent domain rulings.

II.

The court of appeals affirmed the trial court's ruling that CDH correspondence issued to O.C. Coal and The Mill effected a total regulatory taking of The Mill's property. *The Mill III,* 868 P.2d at 1110. On certiorari review to this court, CDH argues that its letters to O.C. Coal and The Mill did not rise to the level of regulation and thus The Mill's regulatory taking claim must fail because it is not ripe. Furthermore, CDH argues, The Mill's inability to put the property to reasonable economic use was not a result of CDH's actions, but rather of the contamination on the property. For that reason, it argues, the claim should fail for lack of causation. CDH also contends that viable economic uses for the property remain, but, even if there were no remaining economic uses, any restrictions placed on the property by CDH did not effect a compensable taking under *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, ___, 112 S.Ct. 2886, 2901, 120 L.Ed.2d 798 (1992), because (1) the restrictions were consistent with

background principles of nuisance and property law, and (2) the restrictions reflected recent scientific recognition of the hazards presented to human health by radioactive materials.

The Mill counters that because CDH records indicated that its property was not under license by CDH at the time of purchase and that the property had no use restrictions in place, the restrictions later imposed by CDH did not inhere in its title to the property. Furthermore, The Mill argues, its actual use of the property did not constitute common law nuisance because it complied with all of the CDH guidelines. The Mill also argues that even if CDH action did not effect a per se taking by depriving The Mill of all economic use of its property, a court must balance the competing public and private interests to determine whether a regulatory taking nevertheless occurred. Under this balancing test, The Mill asserts that the letters issued by CDH constituted a regulatory taking.

The court of appeals rejected CDH's ripeness argument and, upon weighing the public and private interests affected by regulation of The Mill's property, found that the restrictions placed on the use of the property by CDH effected a regulatory taking. We do not agree with the court of appeals' analysis.

A land-use regulation constitutes a taking under the Colorado and United States constitutions if it prevents all economically viable use of the property. *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2893; *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990). Regulation which does not prevent all economic use may also constitute a taking if it goes "too

far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). The determination of whether a regulation goes "too far" for purposes of the Fifth Amendment is essentially an "ad hoc, factual" inquiry. *Golden Pacific Bancorp v. United States*, 15 F.3d 1066, 1072 (Fed. Cir. 1994) (citation omitted), *cert. denied*, ___ U.S. ___, 115 S.Ct. 420, 130 L.Ed.2d 335 (1994).

> The [Supreme Court], however, has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."

Id. (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978)); *Kirk v. Denver Publishing Co.*, 818 P.2d 262, 268 (Colo. 1991). The Supreme Court has recognized that in weighing these factors the force of the third factor may be "so overwhelming . . . that it disposes of the takings questions." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984). That is the case here.[3]

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[3] As the court of appeals recognized, the question of estoppel is subsumed in this analysis. Like investment-backed expectations, reliance on agency action must be reasonable before the agency is estopped from taking a contrary action. *Committee for Better Health Care v. Meyer*, 830 P.2d 884, 892 (Colo. 1992); *P-W*

The "reasonable investment-backed expectations" of the regulated party is the dispositive factor in takings analysis when the regulated party is "on notice" of the extent of the government's regulatory authority over its property. For example, in *Monsanto*, the Supreme Court found that Monsanto had no reasonable investment-backed expectations that data submitted to EPA would be kept confidential because "Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration." 467 U.S. at 1006, 104 S.Ct. at 2874. Similarly, the *Golden Pacific* court found "the highly regulated nature of the banking industry" to be dispositive of the taking issue. 15 F.3d at 1074. "Put most simply," the court wrote, "Golden Pacific could not have reasonably expected that the government 'would fail to enforce the applicable statutes and regulations.' " *Id.* (citation omitted). In short, expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment.[4]

Investments, Inc. v. City of Westminster, 655 P.2d 1365, 1373 (Colo. 1982) (unreasonable to rely on mere issuance of water and sewer tap permits as a representation that service would be available indefinitely). Thus, by determining whether The Mill's expectations concerning the future regulation of its property were reasonable for purposes of takings analysis, we also resolve the question of whether CDH was estopped from taking a regulatory posture contrary to the position reflected in state records at the time The Mill purchased the property.

[4] We note that *Monsanto* involved the regulation of personal property which, as the *Lucas* decision points out, traditionally has been subject to a higher degree of state control than real property. However, the real property in this case was purchased

The Mill was "on notice" that the radioactive materials present on the property were dangerous and highly regulated at both the state and federal level as was the use of the property itself.[5] While at the time The Mill purchased this property, scientific knowledge concerning the hazards of radiation was not as sophisticated as it is now, there nevertheless existed an awareness that the hazards posed by radiation were severe. The Colorado radiation control statute in effect at the time acknowledged that sites where radioactive materials are present "will represent a continuing and perpetual responsibility involving the public health, safety and general welfare." 1963 C.R.S. § 66-26-3(h) (1967 Supp.). As early as 1971, a Congressional subcommittee began to investigate the dangers presented by the use of uranium mill tailings for construction purposes. The evidence presented at those hearings led to a program in Colorado to remove tailings from sites and structures in Grand Junction in 1972. *See* H.R. Rep. No. 1480(I), 95th Cong., 2d Sess. 11-12 (1978),

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with knowledge that it was a former uranium mill site with an existing tailings pile. As detailed *infra*, from the time milling operations were authorized on these sites, the sites became subject to tight controls more analogous to personal property regulation than to the limited levels of regulation traditionally applied to real property on which sensitive activities had never been conducted. Accordingly, we find that a distinction between the regulatory expectations of real and personal property owners is inappropriate in this case.

[5] The record may support the trial court's finding that The Mill was unaware of contamination on the mill yard itself. However, the question before the court is whether The Mill's expectation that there would be no further regulation of the mill yard is reasonable. This determination does not depend on the subjective belief of The Mill. It is an objective determination.

reprinted in 1978 U.S.C.C.A.N. 7433, 7434. Moreover, the facts stipulated to by the parties in the regulatory taking action indicated that The Mill knew that the entire property, including the mill yard, had been subject to federal licensing and regulation since 1962 due to the presence of radioactive contamination.

Although the parties also stipulated that, at the time The Mill purchased the property in 1973, the mill yard was authorized for unrestricted use, it is important to view that stipulation in context. Testimony in the record indicates that no specific restrictions were imposed on the mill yard insofar as CDH did not require The Mill to obtain a specific license for any portion of the property because CDH preferred to obtain compliance through voluntary means. The record also shows that there was some confusion in the department concerning whether the mill yard was subject to a general license. However, the authority to regulate this site was in place at the time of the purchase, whether or not it was exercised at that time.

To the extent that radioactive contamination in fact still existed on the property, it remained subject to broad regulatory authority. The Colorado radiation control statute gave CDH authority to "develop and conduct programs for evaluation and control of hazards associated with the use of any and all radioactive materials and other sources of ionizing radiation." 1963 C.R.S. § 66-26-3 (1967 Supp.) Comprehensive state regulations governing radioactive materials, specifically, maintenance of uranium mill tailings piles and the possession of radioactive material, were already in effect at the time the Mill purchased the property. *See* 6 C.C.R. 1007-1 (1970). At the

time The Mill purchased the site, CDH sent copies of these regulations to the new owner and, after that, continued to monitor both the mill yard and the tailings pile.

Under these radiation control regulations, "[n]o person shall receive, use, possess, transfer or dispose of radioactive material except as authorized in a specific or general license issued pursuant to these regulations." RH 3.1, 6 C.C.R. 1007-1 (1970). The regulations imposed a "general license" that was "effective without the filing of applications with [CDH] or the issuance of licensing documents to particular persons" upon receipt of title to source material, e.g., "uranium or thorium, or any combination thereof, in any physical or chemical form." RH 1.6; RH 3.2; RH 3.3.3. Uranium mill tailings were exempt from these licensing requirements "provided they are in compliance with the provisions set forth in [the CDH regulations governing mill tailings]." RH 3.19.2.4. Under the regulations, CDH was authorized to "impose upon any licensee . . . such requirements in addition to those established in these regulations as it deems appropriate or necessary to minimize danger to public health and safety or property." RH 1.14. Likewise, licensees were required to allow CDH to inspect their facilities and sources of radiation on their property. RH 1.10. Given this regulatory environment, it is unreasonable for The Mill to claim it had no notice of the significant risk of further regulation of the site.[6]

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[6] Furthermore, evidence in the record indicates that The Mill may have had actual knowledge of this ongoing regulatory authority. In 1983, the mill owners received an inspection report from CDH stating that the inspection was performed under a

Just as a property owner "on notice" of government regulatory authority cannot reasonably expect to avoid regulation, neither can a property owner reasonably expect to put property to a use that constitutes a nuisance, even if that is the only economically viable use for the property. "In accord with ordinary intuition, government need not pay *even for complete takeover or destruction* if the latter is justified by the owner's insistence on using his property to injure other people or their property." Laurence H. Tribe, *American Constitutional Law* 593 (New York 1988) (citations omitted) (emphasis added). In particular, the Supreme Court holds that where a regulatory action

> does not proscribe a productive use that was previously permissible under relevant property and nuisance principles . . . [t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Lucas, ___ U.S. at ___, 112 S.Ct. at 2901. Accordingly, the state may always restrict uses by regulation or statute

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general license pursuant to RH 3.2.1. Marcus Bishop was the general partner in The Mill responsible for inspecting CDH records prior to purchasing the property. When asked whether this report was the first indication that there was a general license in effect, he stated, "This is the first indication that I have in writing I have any recollection of. There may have been some conversations with some of the people about a general license, but it's an issue that is still vague to me. I still don't understand the general license."

when such uses previously were forbidden under common law principles. These uses were never part of the landowner's "bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176, 100 S.Ct. at 391. Thus, it is unreasonable for a landowner to expect that such uses would never be formally prohibited.

The relevant Colorado common law principles would not permit a landowner to engage in activities that spread radioactive contamination.[7] Under Colorado common law, landowners have a duty to prevent activities and *conditions* on their land from creating an unreasonable risk of harm to others. *Moore v. Standard Paint & Glass*, 145 Colo. 151, 155, 358 P.2d 33, 36 (1960) (emphasis added). A public nuisance is the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public. Specifically, under Colorado common law, land uses that cause pollution constitute a nuisance. *Wilmore v. Chain 0' Mines*, 96 Colo. 319, 325-26, 44 P.2d 1024, 1027 (1934) ("Whatever rights might be claimed by the defendant owners, they cannot justify the claim of a right to pollute the stream."). Under

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[7] Although the trial court did not address the question of whether CDH restrictions were consistent with the principles of nuisance and property law in existence at the time of The Mill's purchase of the processing site, this determination is a question of law that an appellate court may resolve independently. *See Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993) (where an issue involves only legal and not factual questions, the lower court's judgment is subject to independent review by the appellate court).

Colorado's nuisance statute enacted a year before The Mill purchased the processing site, "[a]ny unlawful pollution or contamination of any surface or subsurface waters . . . or of the air" constitutes a nuisance. 1963 C.R.S. § 39-13-305. Improperly handled, radioactive materials in particular were treated as a public nuisance under Colorado solid waste laws enacted before The Mill purchased the site. *See* 1963 C.R.S. § 36-23-10(d), -14 (1967 Supp.).

Under these principles of Colorado nuisance law, the right to make any use of the property that would create a hazard to public health by spreading radioactive contamination was excluded from The Mill's title at the onset. The radioactive contamination at the site was present as a result of prior uranium milling activities. It was a condition of the property that did not either arise or disappear as a result of any classification or correspondence issued by CDH. Accordingly, any use limitations suggested by CDH to avoid the spreading of radioactive contamination could not have constituted a taking because those uses were never lawfully available to The Mill even in the absence of CDH action.[8]

Based on this analysis, we conclude that the right to use the processing site in a way that would spread radioactive contamination did not constitute a reasonable

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[8] Because we find that the uses restricted by CDH action were not within The Mill's reasonable expectations for use of the property, we will not address the questions of whether the CDH correspondence with The Mill rose to the level of regulation or whether CDH "regulation" destroyed all economic value in the property.

investment-backed expectation.[9] Because we find The Mill's expectations to have been highly unreasonable, this factor is "so overwhelming" as to dispose of the taking issue for purposes of determining just compensation. *Monsanto*, 467 U.S. at 1005, 104 S.Ct. at 2874.

III.

Sections 25-11-301 to 305, 11A C.R.S. (1989), govern the state's participation in federal implementation of UMTRCA. Under section 303(d)(III), CDH is authorized to acquire a processing site by condemnation proceedings if necessary. § 25-11-303(d)(III). Fair market value in these proceedings is to be determined "in accordance with the criteria established in section 24-56-117(1)(c), C.R.S., and the provisions of the federal 'Uranium Mill Tailings Radiation Control Act of 1978.' " *Id.* Section 24-56-117(1)(c), 10B C.R.S. (1988), codifies the Colorado rule against enhanced value. The rule requires the state to disregard any change in the fair market value of the property caused by the public improvement for which the property is being acquired in determining just compensation for the property. § 24-56-117(1)(c).[10]

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[9] We agree that the Mill's actual use of the property did not constitute a nuisance, but that was precisely because The Mill complied with the CDH limitations.

[10] The statute provides that

> Before the initiation of negotiations for acquisition of real property, an amount shall be established which it is reasonably believed is just compensation therefor, and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property.

In the eminent domain action, the court of appeals found that the stipulation entered into by The Mill and CDH setting the fair market value of The Mill's property in its contaminated state at zero was dictated by the rule against enhanced value and set aside the stipulation. Because application of the rule would limit The Mill's compensation to the value of the property in its contaminated state, the court concluded that the rule against enhanced value was contrary to the intent of UMTRCA and resulted in unfair and disparate treatment of the owners of designated sites. *The Mill III*, 868 P.2d at 1103. Specifically, the court found that the financing scheme of UMTRCA indicated an intent that property owners pay nothing for cleanup, and thus, for the state to collect the difference between the contaminated and decontaminated property values would be contrary to the intent of the statute. *Id.*[11] It found further that the Colorado

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> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of and summary of the basis for the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

§ 24-56-117(1)(c), 10B C.R.S. (1988).

[11] The court of appeals also found it contrary to the intent of UMTRCA that site owners invariably would lose their initial

implementation scheme under UMTRCA resulted in disparate treatment of similarly-situated property owners,

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investment under the rule against enhanced value. The court erroneously assumed that application of the rule against enhanced value would dictate a finding of nominal or zero market value in condemnation actions pursuant to UMTRCA so that owners always would lose their initial investment in the property, as well as be forced to repurchase their property at fair market value after decontamination was completed.

The rule against enhanced value requires only that the property be valued in its present condition without regard to any increase or decrease in value projected upon completion of the government project for which the property was condemned. *See* § 24-56-117(1)(c). It does not mean that a property owner will necessarily lose the initial investment in the property. As discussed *infra,* site acquisition is envisioned under UMTRCA in those instances where the initial purchase price of the property reflected on-site contamination. Presumably, the rational and informed site owner would not have purchased the site unless some use or value remained despite the contamination. The fair market value determined under the rule would reflect the more-than-nominal value of those uses. Moreover, if the site owner purchased the site at a price that reflected on-site contamination, the value determined under the rule would allow the owner to recover that initial investment.

In this case, the value of the property was set at zero by stipulation of the parties; it was not dictated by state law. The Mill took what it thought was the best strategic position on property value, and forfeited its initial investment as a result of that strategy. Neither the court of appeals' prior decision in *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989), nor the rule against enhanced value allows the state to condemn a site and then pay less than fair market value of the property at that time. Accordingly, we will address only whether it is consistent with UMTRCA to apply the rule against enhanced valuation to condemnation actions to the extent that it excludes compensation for any *increased* value resulting from remedial action by the government.

since those whose property is cleaned up by consensual agreement pay nothing, while property owners whose property is acquired by the state must repurchase their property at its market value in a decontaminated state. *Id.* The court of appeals declined to follow its prior decision in *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989), to the extent it was inconsistent with its ruling in this case. We do not agree.

In addressing and rejecting the court of appeals' analysis, we will examine first the alleged conflict between Colorado's enhanced value statute and the federal law. Then we will consider the equal protection implications caused by application of the rule against enhanced value.

A. Inconsistency with the Federal Statute

Under the Supremacy Clause of the United States Constitution, state statutes that conflict with federal statutes are invalid. *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1054 (Colo. 1982); *Housing Auth. v. United States*, 980 F.2d 624, 631 (10th Cir. 1992). Federal law preempts state law when Congress expresses clear intent to preempt state law; when there is outright or actual conflict between federal and state law; when compliance with both federal and state law is physically impossible; when there is an implicit barrier within federal law to state regulation in a particular area; when federal legislation is so comprehensive as to occupy the entire field of regulation; or when state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758

F. Supp. 1399, 1407 (D. Colo. 1989). However, exercise of federal supremacy is not to be presumed lightly. *Brubaker*, 652 P.2d at 1055. We must begin by assuming that the historic police powers of the state are not to be superseded by any federal laws or regulations unless that congressional purpose is clearly shown. *Dantus v. First Federal Savings & Loan Ass'n*, 502 F. Supp. 658, 660 (D. Colo. 1980).

In construing statutes to make this determination of Congressional objectives in enacting UMTRCA, we must give effect to the intent reflected in the language of the enactment and the legislative process. *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1494 (10th Cir. 1990). Congressional intent is determined primarily from the plain language of the statute, and secondarily from the statute's legislative history. *Mass v. Martin Marietta Corp.*, 805 F. Supp. 1530, 1534 (D. Colo. 1992).

The court of appeals found that the Colorado rule against enhanced value is an obstacle to the accomplishment and execution of the objectives of UMTRCA. We do not agree. We find that both the plain language of UMTRCA and its legislative history indicate a legislative intent not inconsistent[12] with the Colorado rule against enhanced value which requires that property subject to condemnation proceedings be valued in its unimproved

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[12] Because Supremacy Clause analysis begins with the assumption that state regulation is *not* superseded by federal regulation, *Brubaker*, 652 P.2d at 1054, *Dantus*, 502 F. Supp. at 660, the court need not find that the federal and state statutes are consistent, only that they are *not inconsistent*.

state. *Williams*, 147 Colo. at 198-202, 363 P.2d at 173-75; § 24-56-117(1)(c).

1. The Language of the Federal Statute

Turning first to the plain language of the statute, the stated purpose of UMTRCA is to clean up and stabilize uranium processing sites to alleviate the danger to the public posed by radiation emitted from mill tailings and other radioactive waste at such sites, 42 U.S.C. § 7901. To this end, the federal government "shall pay 90 per centum of the actual cost of such remedial action, including the actual costs of acquiring such site (and any interest therein) . . . and the state shall pay the remainder of such costs from non-Federal funds." § 7917(a).

The act addresses two possible cleanup scenarios: cleanup with the consent of the property owner, section 7913(c), and cleanup accomplished after the acquisition of the site by the state in which the property is located, section 7914(a). In deciding whether to proceed by one method or the other, the sole factor enumerated in the statute to which the federal Secretary of Energy and the Nuclear Regulatory Commission must give consideration is the "prevention of windfall profits" to the property owner. *Id.* If the cleanup will result in a windfall to the property owner, the state will be directed to acquire the site, *id.*, with the option to sell the decontaminated property back to the original owner at fair market value. § 7914(e)(2). If the state is not directed to acquire the site, the state may enter into a consent agreement with the property owner which will "releas[e] the United States of any liability or claim thereof" and "hold[] the United

States harmless against any claim . . . arising out of the performance of any such remedial action." § 7913(c)(2). UMTRCA thus distinguishes between property owners to whom a windfall benefit would accrue and property owners to whom a windfall would not accrue in determining which cleanup scenario to follow.

The Mill argues that

> [t]he perceived 'windfall' is the cost associated with the remedial action undertaken by DOE which otherwise could have been borne by the property owner. However, [UMTRCA's] specific purpose is to obligate DOE to absorb these costs, since 'but for' the Federal contracts which gave rise to the tailings which contaminate these sites, the properties would likely be free from uranium contamination.

According to The Mill, the admonition against windfall profits in section 7914(a) is merely an attempt to limit costs. It does not mandate differential treatment of property owners whose property is remediated by consent and those whose property is acquired by the state before remediation.

UMTRCA does not define "windfall profits." Neither the Department of Energy nor the Nuclear Regulatory Commission has issued regulations enunciating the factors on which it bases its determination to require a state to acquire a processing site, or elaborating how "windfall profits" may be identified. Thus, we must interpret the term without statutory or regulatory guidance.

In reading a statute we are required to adopt an interpretation that gives "consistent, harmonious and sensible effect" to all of the statute's provisions. *Colorado*

State Bd. of Medical Examiners v. Saddoris, 825 P.2d 39, 42 (Colo. 1992) (citation omitted). Furthermore, the court must give words their commonly accepted and understood meaning. *East Lakewood Sanitation Dist. v. District Court*, 842 P.2d 233, 235 (Colo. 1992).

The Mill's interpretation fails to "sensibly" and "harmoniously" construe the statute. First, if the windfall profit addressed by UMTRCA is merely the cost of remedial action, including acquisition costs, then it would be impossible to consider "prevention" of windfall profits as required by section 7914, since all cleanup effort would result in some windfall to the property owner. The Secretary of Energy and the Nuclear Regulatory Commission could only consider "limitation" of windfall profits. Second, to treat "windfall profits" as the cost of cleanup, as The Mill recommends, would read consensual cleanup under section 7913(c) out of the statute. Since all remedial action would result in some windfall profit, prevention of which is the sole enumerated factor for consideration under section 7914(a), presumably the Secretary of Energy and the Nuclear Regulatory Commission would require acquisition of most, if not all, sites. Finally, The Mill's interpretation also fails to acknowledge that property owners may benefit not only from avoiding the cost of cleanup (including future liability arising from on-site pollution), but also from the increased value of the property after the government-funded cleanup is complete. While the statute clearly is designed to require federal and state government to bear the cost of cleanup, there is no evidence that it was intended to provide these secondary benefits to landowners as well. Accordingly, we must identify a satisfactory alternative construction.

A "windfall" is commonly understood to mean "an unexpected or sudden gain or advantage." *Webster's Third New International Dictionary* 2619-20 (1986). "Profit," in the context of financial matters such as these, generally means the [sic] "the excess of returns over expenditure in a transaction or series of transactions." *Id.* at 1811. Thus, "windfall profit" must occur where a transaction produces some unexpected excess of returns over expenditures. In the context of this statute, the transaction in question must be the acquisition of property by the state since, under section 7914(a), it is "[i]n determining whether to *require the State to acquire a designated processing site* or interest therein, [that] consideration shall be given to the *prevention of windfall profits.*" § 7914(a) (emphasis added).

Under this definition, windfall profits would accrue to a property owner as a result of cleanup only where the property owner purchased the property in its contaminated state at a price which reflected the presence of contamination and then, without making any expenditures for cleanup, could resell the property, or interest therein, at a price reflecting an increase in value due to the cleanup. Such an increase in market value due to cleanup would necessarily be unexpected, and thus a "windfall," because if government-funded cleanup plans had been publicly known, the market price of the property in a contaminated state would have been comparable to that of similar, uncontaminated property.

Not all cleanups would result in such a windfall to the property owner. For example, where the property owner purchased the tract in an uncontaminated state

before the milling operations took place pursuant to federal contracts, cleanup of the property merely returns the property to its state at the time of initial purchase.[13] The same would be true where the property owner purchased the tract after the decision to take remedial action had been made or after remedial action had begun, so that the purchase price reflected the decontaminated value of the property. Presumably, in these circumstances the Secretary of Energy and the Nuclear Regulatory Commission would not require the state to acquire the processing site prior to performing remedial action.

The rule against enhanced value is not inconsistent with UMTRCA's policy of preventing windfall profits to the property owner. In fact, the rule furthers UMTRCA policy. If the property owner were allowed to collect the

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[13] The uranium mill tailings addressed under UMTRCA were produced by uranium milling operations under federal contracts. Because at the time milling operations were underway the tailings were not believed to be a health hazard, federal cost-plus contracts allowed for only a very small expenditure for tailings disposal. Profit margins under the contracts did not accommodate the cleanup expenses now recognized as necessary to assure public safety. H.R. Rep. No. 1480(II) at 58, *reprinted in* 1978 U.S.C.A.A.N. 7477-78.

Increased property value that accrues to these property owners as a result of remedial action does not constitute a windfall profit because (1) on-site hazardous contamination resulted in a decrease in property value after purchase of the site which offsets the increase in value created by cleanup; and (2) cost compensation calculated under federal cost-plus contracts during milling operations did not account for decontamination expenses. Governmental cleanup thus does not result in an unexpected double-benefit to these property owners.

value of the property in its decontaminated state, the property owner would not only be spared the expense of the cleanup, but would also receive the increase in market value resulting from the cleanup. While the statute does not require property owners to pay for the cleanup itself, as indicated by placing the full cost on the federal and state governments in section 7917(a), the rule against enhanced value assures that the property owner cannot collect through condemnation proceedings the "windfall profits" that state acquisition of the property was intended to prevent.

2. The Legislative History of the Federal Statute

The legislative history of UMTRCA does not define "windfall profits," or address the criteria for acquisition of processing sites. However, nothing in the legislative history indicates that the Colorado rule against enhanced value is inconsistent with UMTRCA. In its "Section-by-Section Analysis and Committee Comments," House Report No. 1480 states that the "affected State [shall] acquire the processing site before remedial action is initiated if such acquisition is determined appropriate by the Secretary and the NRC." H.R. Rep. No. 1480(II) at 37, *reprinted in* 1978 U.S.C.A.A.N. 7464. The Report specifically indicates that "[s]uch acquisition is to be accomplished pursuant to State law." *Id.* This reference to state law indicates that Congress intended for the state to utilize the same policies and procedures in this context as it uses in other types of land acquisition. In Colorado, the rule against enhanced value is generally applicable to the acquisition of land by the state in other contexts. *See*

§ 24-56-117 ("Any state agency or political subdivision of the state which acquires real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of such program or project shall comply with the following policies:"); Williams, 147 Colo. at 198-202, 363 P.2d at 173-75.

The committee also noted that where cleanup is accomplished by consent,

> the property owner will benefit from the voluntary remedial action provided by this act. Clearly, the committee does not want to find that at some later date the United States is faced with a claim from such owner, his heirs, successors or assigns concerning such remedial action or arising from such action.

H.R. Rep. No. 1480(II) at 37, *reprinted in* 1978 U.S.C.A.A.N. 7464. Thus, the committee viewed the waiver of liability that is part of a consent agreement to be at least partial consideration for the benefit that accrues to the property owner. Under the interpretation urged by The Mill, the property owner would receive not only the benefit of the cleanup and the attendant increase in property value, but would also avoid providing a waiver releasing the United States from liability which otherwise would have been required if the site had been decontaminated under a consent agreement. Such an interpretation would create every incentive for a property owner to resist consensual cleanup, force the state to condemn the processing site in order to perform remedial action, and thus drive up program costs. Since the committee was "concerned about the cost of acquisition under this section and expect[ed] that it be utilized only

when necessary," H.R. Rep. No. 1480(II) at 38, *reprinted in* 1978 U.S.C.A.A.N. 7465, such a construction is clearly contrary to the legislative intent of UMTRCA as expressed in the Act's legislative history. Application of the rule against enhanced value would eliminate this adverse incentive and thus be more consistent with Congressional intent.

B. Equal Protection

The court of appeals found that applying traditional condemnation rules, such as the rule against enhanced value, to property acquisitions under UMTRCA resulted in disparate treatment of similarly-situated property owners. This result, the court found, is "further evidence that the traditional enhancement rule was not intended to apply under UMTRCA." *The Mill III*, 868 P.2d at 1105. Because we find that property owners whose property is subject to condemnation proceedings and property owners whose property is subject to consensual remedial cleanup are not similarly situated, we disagree.

The equal protection guarantees under the Colorado and United States constitutions assure like treatment of all who are similarly situated. Colo. Const. art. II, § 25; U.S. Const. amend. 14.; *Mayo v. National Farmers Union Property and Casualty Co.*, 833 P.2d 54, 57 (Colo. 1992). If persons alleging disparate treatment are not similarly situated, the equal protection challenge to a statute must fail. *Western Medical Lath, Inc. v. Acoustical & Constr. Supply, Inc.*, 851 P.2d 875, 880 (Colo. 1993).

As discussed above, the decision to acquire property, as opposed to entering into a consensual arrangement for cleanup, is based on the prevention of windfall profits to the property owner. By agreement with the federal government, the state is required to acquire only those processing sites where the Secretary of Energy and the Nuclear Regulatory Commission already have made a threshold determination that the owners would stand to make a windfall profit if remedial action were to proceed under a consensual agreement. This finding alone indicates that the two groups of property owners are not similarly situated. Accordingly, any equal protection challenge to the application of the rule against enhanced value must fail.

After this examination of the language and legislative intent of UMTRCA, we conclude that the rule against enhanced value codified in section 24-56-117(1)(c) is fully consistent with Congressional intent in enacting UMTRCA.

IV.

For the foregoing reasons, we find that 1983 correspondence between CDH and The Mill did not constitute a regulatory taking in violation of the United States and Colorado constitutions. We also find that application of the Colorado rule against enhanced value in condemnation proceedings is not contrary to the intent of UMTRCA, and thus, that the stipulation of zero value entered into by The Mill and CDH may stand. Accordingly, we (1) reverse the court of appeals' holdings on both issues, (2) return the case to the court of appeals for

remand to the district court with instructions to dismiss The Mill's regulatory taking and estoppel claims, and (3) return the case to the court of appeals for reinstatement of the judgment of the Gunnison County District Court granting title to the property to CDH.

ERICKSON, J., specially concurs.

SCOTT, J., dissents.

State v. The Mill, No. 93SC418

JUSTICE ERICKSON specially concurring:

We granted certiorari to review both the regulatory taking and eminent domain rulings in *The Mill v. State of Colorado, Department of Health*, 868 P.2d 1099 (Colo. App. 1993).[14] I agree with the majority that the court of appeals erred in finding a regulatory taking of The Mill's property. I also agree that the enhanced value statute, section 24-56-117(1)(c), 10B C.R.S. (1988), is dispositive in this case in determining whether the decontaminated value of a property should be considered for purposes of eminent domain pursuant to the Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 U.S.C. §§ 7901-7942 (1993

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[14] We previously reviewed inverse condemnation and regulatory taking issues in *State of Colorado, Department of Health v. The Mill*, 809 P.2d 434 (Colo. 1991) and remanded to the district court for further consideration of promissory estoppel and regulatory taking claims asserted by The Mill.

Supp.). I concur in the majority opinion and write separately on the applicability of the enhanced value rule in this case.

I

The 61-acre parcel of land (property) at issue in this case consists of a 25-acre mill yard and a 36-acre tailings pile. Pursuant to an Atomic Energy Commission (AEC) license, the property was operated as a uranium processing mill and for storage of uranium mill tailings from the late 1950s until 1962. In 1968, the AEC delegated regulatory authority of the radioactive materials and the AEC license to the State of Colorado, which terminated the license for the property in issue that adjoins the Gunnison Airport.

The Mill purchased the property in 1973. At that time, the Colorado Department of Health (CDH) had imposed no restrictions on the use of the property. Radioactive contamination of the mill yard was found in 1976. In 1978, Congress enacted UMTRCA to decontaminate twenty-two inactive uranium mills to protect the public from the health hazards associated with the radioactivity of uranium mills. After radioactive contamination of the property was confirmed in 1980 and 1982, The Mill leased the property to O.C. Coal Company in 1983. The Mill notified CDH of the lease agreement, and CDH responded with a letter advising The Mill and O.C. Coal of safety precautions that were recommended because of the radioactive contamination of the property.

O.C. Coal terminated the lease in 1984. The Mill contends that the CDH letters setting forth safety requirements caused O.C. Coal to terminate the lease and brought an action against CDH in 1986, claiming a regulatory taking. While the regulatory takings case was on appeal, CDH initiated a condemnation proceeding in accordance with UMTRCA and the applicable Colorado statute. § 25-11-303(1)(d), 11A C.R.S. (1989 & 1994 Supp.). In the condemnation action under UMTRCA, the parties stipulated that the market value of the property in its contaminated state was zero, and the trial court vested title to the property in CDH. The Mill appealed both the regulatory taking and the condemnation decisions to the court of appeals.

The court of appeals consolidated the regulatory takings case with the eminent domain case. In the consolidated appeal, the court of appeals held that a regulatory taking had occurred and set aside the stipulation of the parties that the fair market value of the property in its contaminated state was zero. On remand, the court of appeals directed that fair market value be determined based on the decontaminated value of the property, and ordered a new determination of just compensation.

II

In *Department of Health v. Hecla Mining Co.*, 781 P.2d 122, 125 (Colo. App. 1989), the court of appeals stated: "We do not find support in the federal law for [the] assertion that the purpose of [UMTRCA] is to meet an

obligation to remedy government-initiated contamination."[15] The legislative history of UMTRCA reflects a congressional intent not to overburden either the federal or state governments with the costs of clean-ups.[16] Rather than protecting the investment of the property owner, Congress' concern was to minimize the costs of the program in cleaning up radioactive uranium sites.[17]

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[15] The court of appeals in *Hecla* subsequently stated:

> The [UMTRCA] . . . expressly set forth, as the purpose for the legislation, the protection of the public health, safety, and welfare from the potential and significant radiation health hazards of uranium mill tailings. . . . This is an undisputable public purpose. . . .

Id. (citations omitted); see 42 U.S.C. § 7901(b)(1) (stating that the purpose of the UMTRCA is "to stabilize and control . . . tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public. . . . ").

[16] The UMTRCA divides the costs of decontamination between the federal government (90%) and state government (10%). 42 U.S.C. § 7917(a). In contrast, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1993 Supp.), imposes liability upon "the owner and operator of a . . . facility," or "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. . . . " §§ 9607(a)(1)-(2).

The Mill is also subject to federal legislation that imposes liability on mill owners for non-compliance with radon emission standards. 40 C.F.R. § 61.222(b) (1993). The cost of decontamination of The Mill property has been estimated at $40 million.

[17] Such a concern eliminates the disparate appearance of the two decontamination options provided in UMTRCA. A contaminated site may be cleaned up either (1) through an agreement with the owner, 42 U.S.C. § 7913(a), or (2) by purchase or condemnation when the Secretary of Energy, with the

Hecla set out the key elements of the legislative history and stated:

> The legislative history shows that the Radiation Control Act was enacted due to concern over the health threat posed by unstable and uncontrolled inactive uranium mill tailings and *not* to meet any legal obligation on the part of the federal government to remedy the hazardous situations at such sites. Concern over costs of the program prompted Congress to provide for state acquisition of mill sites, particularly if decontamination would result in windfall profits to an owner who retained the site after decontamination.

Hecla, 781 P.2d at 124. The court of appeals in *Hecla* held that in a condemnation proceeding, property must be valued in its present condition, without regard to the governmental purpose supporting the necessity for condemnation or the radioactive contamination of the property. *Accord, Williams v. City and County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961); § 24-56-117(1)(c).

In a condemnation proceeding, the property taken is valued at its fair actual cash market value at the time of

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concurrence of the Nuclear Regulatory Commission, determines that decontamination would lead to "windfall profits" for the owner. 42 U.S.C. §§ 7914(a) and (e)(2).

The two options are intended to reduce the costs of the program to the public by preventing the receipt of "windfall profits" to landowners. Allowing owners such as The Mill to recover the uncontaminated value of their land, after purchasing the property in a contaminated condition, would provide the owners a windfall and would increase the cost of the program, contrary to congressional intent.

trial or when the property is taken. § 38-1-114, 16A C.R.S. (1982 & 1994 Supp.); *see Mulford v. Farmers' Reservoir & Irrigation Co.*, 62 Colo. 167, 161 P. 301 (1916). Market value is the price a property will bring when it is offered for sale by one who desires but is not obligated to sell, and is bought by one who desires, but is under no necessity to buy the property. *Dep't of Highways v. Schuloff*, 167 Colo. 72, 445 P.2d 402 (1968). The value of the land taken is based on present conditions and not on the future development of the property. *Id.*

When Congress enacted UMTRCA, it directed that acquisitions be accomplished pursuant to state law. H.R. Rep. No. 95-1480 (II), 95th Cong., 2d Sess. at 37 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7464. When the Colorado General Assembly agreed to the financial commitments of UMTRCA and authorized the CDH to participate in its implementation, it specifically directed that such acquisitions be conducted pursuant to the eminent domain laws of Colorado. § 25-11-303(1)(d). In particular, the General Assembly directed that the enhanced value criteria in section 24-56-117(1)(c), be followed when condemning property under UMTRCA. Section 24-56-117(1)(c) provides in relevant part: "Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired . . . shall be disregarded in determining the compensation for the property." Section 24-56-117(1)(c) is the statutory codification of the rule against enhanced value. *See Williams*, 147 Colo. at 199-200, 363 P.2d at 173-74. The court of appeals dismissed section 24-56-117 as "general policy" that must yield to what the court stated was the "ends" of

UMTRCA (protecting the owner's investment). *The Mill*, 868 P.2d at 1106.

The UMTRCA is not an exception to the enhanced value rule, but rather incorporates the rule into its framework. In *Hecla*, the court of appeals held that evidence of the decontaminated value of the land, "because it fails to reflect the actual condition of the property at the time of the taking, is necessarily speculative or prospective and thus inadmissible." *Hecla*, 781 P.2d at 126. The court of appeals in the present case declared that *Hecla* was dispositive of value determination of fair market value and of the issues raised at the immediate possession hearing, but held that the enhanced value rule in *Williams* was inapplicable and that *Hecla* would not be followed as inconsistent with the scheme established by UMTRCA. The court of appeals misinterpreted UMTRCA, and erred in not following *Hecla*.[18]

The enhanced value statute is dispositive of the condemnation issue. The contaminated value of the land was zero. The Mill, in acquiring the property, knew of the property's prior use as a uranium processing mill, which contaminated both the building and the soil. The Mill was effectively limited in the use it could make of its land because of radioactive contamination. Such a limitation on use is not compensable, however, because the only value of The Mill's property would be as the result of

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[18] Judge Smith authored the opinion of the court in *Hecla* and the court of appeals opinion in this case, but the other members of the panel were not the same. The court of appeals panel in this case erred in applying a different interpretation of the UMTRCA than a different panel employed in *Hecla*.

improvements effected by a clean-up that would restore the land to its former condition. The property was contaminated when it was acquired by The Mill. Because the cost of decontaminating the property exceeds the value of the property after the clean-up, the value of the property is zero, and the rule against enhanced value is applicable.

III

The cost of decontaminating The Mill's property is borne by the state and federal governments. A consideration of the property's decontaminated state for purposes of calculating fair market value would grant The Mill more than it acquired when it purchased the property in 1973, and would grant the landowner "windfall profits," profits which Congress intended to avoid in enacting UMTRCA.

Because an application of the rule against enhanced value is in accordance with congressional intent and the intent of the General Assembly, the court of appeals erred in ordering a determination of the property's decontaminated value and in not following *Hecla*. The court of appeals also erred in setting aside the parties' stipulation that the property had no value in its present condition.

State of Colorado v. The Mill, No. 93SC418

JUSTICE SCOTT dissenting:

The majority holds that The Mill, the owner of real property, did not have "reasonable investment-backed

expectations" as to the contemplated use of the "mill yard" because "an extensive regulatory scheme [was] in place at the time of investment," maj. op. at 999-1000, and, as a consequence, any taking by the State does not require compensation. Because I believe such a rule impermissibly blurs the distinction between takings of real and personal property and improperly permits takings without compensation in violation of constitutional mandates, and because I believe the record does not support a conclusion that The Mill's expectations were "highly unreasonable," I respectfully dissent.

Moreover, because the lower court's determination that The Mill was deprived of its entire economic interest in the property is supported by the record, I would hold the actions of the State compensable, assuming The Mill can establish a regulatory taking premised upon its compliance with directives set forth in agency letters and similar communications. Accordingly, because the analysis I would employ requires that we examine the issues the majority fails to address, I respectfully dissent.[19]

I.

In 1973, respondent, The Mill, purchased a lot in Gunnison, Colorado, which had previously been used as a uranium mill and disposal site for uranium mill tailings. The lot was divided into two separate parcels: the "tailings pile" and the "mill yard." Prior to purchasing

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[19] I do not address the issues raised in the eminent domain action because it would be premature in light of my analysis of the takings issue.

the lot, The Mill searched the records of the Colorado Department of Health (CDH) and discovered that in 1971, the State of Colorado had removed the mill yard from licensure, authorized its unrestricted use, and considered the mill yard not contaminated and free for lawful uses such as those contemplated by The Mill.[20] Based on its review of the information in CDH's files, which indicated that the mill yard parcel was decontaminated and safe for unrestricted use, The Mill purchased the subject property in July of 1973.

From 1973 to 1978, CDH conducted various tests of the tailings pile located on property adjacent to The Mill. At some point, CDH also conducted tests of the mill yard. In 1976, CDH found radioactive contamination throughout the mill yard. At that time, CDH informed The Mill of its finding and advised it to take precautionary measures with regard to the mill yard. Both the mill yard and the tailings pile were designated for radiation clean-up under the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 42 U.S.C. § 7901 (1991) ("UMTRCA"). The Mill was informed that it was a "candidate for remedial action" in 1978.

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[20] The mill yard had been licensed in 1964 by the Atomic Energy Commission (AEC). Pursuant to the license, the property was authorized: "[f]or storage only of the contaminated equipment and buildings constituting the Gunnison uranium mill. This license does not authorize removal, use, transfer or decontamination of the equipment and/or buildings in any manner." In 1968 the license was amended to allow for transfer of contaminated equipment to persons not possessing an AEC license provided that decontamination was accomplished in accordance with the AEC standards. Decontamination of equipment and buildings was also authorized.

In 1983, The Mill notified CDH that it had leased the mill yard to O.C. Coal. CDH then sent several letters to both The Mill and O.C. Coal informing them of the "existing mill yard radioactive contamination" and the limited uses to which the mill yard could be put. The trial court found that there had been a taking because of the letters and other actions of CDH, and awarded compensation in the amount of $200,000, based on a total loss of use, rather than a loss of property valuation.

The court of appeals affirmed the trial court's ruling that the CDH correspondence amounted to a total regulatory taking. A majority of this court now reverses, and, in effect, ignores the distinction so clearly drawn between real and personal property in federal takings jurisprudence and, in its place, holds that the adoption of "an extensive regulatory scheme" trumps the fundamental constitutional right to just compensation as a consequence of a government taking. It is to that conclusion of the majority that I take exception.

II

In *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992), the United States Supreme Court reaffirmed its holding in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), where Justice Holmes, writing for the Court, opined that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2893 (citing *Mahon*, 260 U.S at 415, 43 S.Ct. at 160). Writing for the majority in *Lucas*, Justice Scalia acknowledged that the

seventy years of Supreme Court takings jurisprudence has been essentially by ad hoc, factual inquiries. The Court has, however, found regulatory takings "compensable without case-specific inquiry into the public interest advanced in support of the restraint" in instances in which it has "found . . . regulation [by the state] denied all economically beneficial or productive use of land." *Id.* (citing *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981) (footnote omitted)).

In fact, the Court has categorically held that takings which deny all economically beneficial use require compensation. Noting this categorical rule, Justice Scalia suggested the justification for the rule was "simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2894 (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652, 101 S.Ct. 1287, 1304, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting)). Essentially, then, Justice Scalia opined, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2895.

On appeal to this court, CDH argued, and the majority agreed, that the court of appeals erred by failing to

apply the exception stated in *Lucas* that no compensation is due if the restrictions merely duplicate the result that could have been achieved in the courts through nuisance or property law. *Lucas*, ___ U.S. at ___, 112 S.Ct. at 2901. That exception only applies, however, where the "owner is barred from putting land to a use that is proscribed by those existing rules or understandings." *Id.* The *Lucas* Court established that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title *to begin with.*" *Id.* at ___, 112 S.Ct. at 2899 (emphasis added). At the time The Mill purchased the land in 1973, the contemplated use of the land (storage) was not proscribed by any rules or understanding that existed at that time. The anticipated investment-backed use of The Mill property was not unlawful, since the State itself had declared the property authorized for unrestricted use. By its actions in 1983, however, the State was in effect changing the uses and hence, in effect, understandings that reflect a more developed understanding of the hazards of radiation – all of which occurred years after the purchase. Thus, the *Lucas* exception that "the proscribed use interests were not part of [The Mill's] title to begin with," i.e., in 1973, has no application to the case at hand.

Importantly, despite its early infatuation with "harmful or noxious uses," or reliance upon nuisance law, the *Lucas* Court reversed the South Carolina Supreme Court because its judgment was premised upon a determination that the property owner's proposed use was a nuisance,

harmful to the public, and, as a consequence, would render a taking not subject to compensation. *Lucas*, ___ U.S. at ___-___, 112 S.Ct. at 2897-98. Instead, the Court reasoned, "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings' – which require compensation – from regulatory deprivations that do not require compensation." *Id.* at ___, 112 S.Ct. at 2899. Continuing, the Court held: "*A fortiori* the [state's] recitation of a noxious-use justification cannot be a basis for departing from *our categorical rule that total regulatory takings must be compensated.*" *Id.* (emphasis added). The majority fails to take this holding into account.[21]

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[21] The majority in this case emphasizes principles of nuisance law in its holding, stating "under Colorado common law, land owners have a duty to prevent activities and conditions on their land from creating an unreasonable risk of harm to others." Maj. op. at 1002. The majority sets forth further, "[i]n accord with ordinary intuition, government need not pay *even in complete takeover or destruction* if the latter is justified by the owners insistence on using his property to injure other people or their property." Maj. op. at 1001 (citing Laurence H. Tribe, *American Constitutional Law* 593 (New York 1988)).

In the nuisance cases relied on by the majority it was the conduct of the owner of the property that caused the nuisance, not the character of the property itself, over which the owner had no control. In the case at bar, however, The Mill is not putting its property to any noxious use at all – it is merely using it as a storage facility. The Mill is not engaging in any act that makes the property itself dangerous; the property is already dangerous because it is contaminated with radiation.

III

The United States Supreme Court has identified several factors that should be taken into account when determining whether a governmental action amounts to a taking. Among those factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980). I would agree with the majority that the reasonable investment-backed expectations of the regulated party is a dispositive factor in this case. I would disagree, however, with the majority's conclusion that The Mill's expectations in 1971 were unreasonable, in light of the CDH determination that the property was not contaminated and was available for unrestricted use. With respect to owner expectations, the *Lucas* Court stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with *our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of and the State's power over the "bundle of rights" that they acquire when they obtain title to property.*

Lucas, ___ U.S. at ___, 112 S.Ct. at 2899 (emphasis added). Continuing the concept of owner expectations, the Court noted a distinction between personalty and realty:

> And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless. . . . In the case of land, however, we think the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historic compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> *Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation) no matter how weighty the asserted "public interest" involved. . . . We believe similar treatment must be accorded confiscatory regulations,* i.e., regulations that prohibit all economically beneficial use of land. Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself . . . already place[d] upon land ownership.

Id. at ___-___, 112 S.Ct. at 2899-900 (citations and footnotes omitted) (emphasis added). The Court's analysis is consistent with the sharp distinction historically drawn between the treatment of real property and personal property. *See Property Tax Administrator v. Production Geophysical,* 860 P.2d 514, 519 (Colo.1993). For example, we apply the statute of frauds to interests in real property but not to interests in personal property (§ 38-10-108, 16A C.R.S. (1963)) and specific performance is generally directed in contracts concerning the sale of land but not in contracts concerning personal property. *See, e.g., Atchison v. City of Englewood,* 193 Colo. 367, 568 P.2d 13

(1977); *Radetsky v. Palmer*, 70 Colo. 146, 199 P. 490 (1921). The basis for drawing such a distinction is that every parcel of real property is unique. *See Mt. Sneffels Co. v. Estate of Scott*, 789 P.2d 464, 466 (Colo.App.1989). Hence, when the property interest is that associated with the ownership of land, as opposed to personalty, our takings analysis must be guided by the landowner's understandings regarding the bundle of rights he or she acquires with the title to the property. *Id.* ___ U.S. at ___, 112 S.Ct. at 2899. To the contrary, here, the majority assumes that the existence of a comprehensive regulatory scheme requires that we impute to land owners at the time of purchase, today's knowledge of the harm caused by radiation. Such owner expectations are unreasonable years before the effects of radiation are fully understood; the majority's position does not comport with our previous treatment of owner expectations. The inconsistency of the majority's position is reflected by its statement in footnote 4. Maj. op. at 1000 n.4.[22]

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[22] The majority asserts that "expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of the investment." Maj. op. at 1000. The picture drawn by the majority is no different, however, from a situation in which property is acquired for permissible use under existing zoning ordinances and is subsequently "taken" by a change of zoning ordinances within the existing regulatory scheme. Yet it is undisputed that in that situation compensation is required. *See, e.g., Cottonwood Farms v. Board of County Comm'rs of Jefferson County*, 725 P.2d 57, 60 (Colo.App.1986); *see also Gold Run, Ltd. v. Board of County Comm'rs*, 38 Colo.App.44, 46, 554 P.2d 317, 319 (1976) (when zoning is confiscatory it rises to a "taking" of private property requiring compensation).

There have been three important cases decided in this jurisdiction which deal with the concept of owner expectations. *See Ford Leasing v. Board of County Comm'rs*, 186 Colo. 418, 528 P.2d 237 (1974); *Nopro Co. v. Cherry Hills Village*, 180 Colo. 217, 504 P.2d 344 (1972); *Gold Run, Ltd. v. Board of County Comm'rs*, 38 Colo.App.44, 554 P.2d 317 (1976). In each of these three cases, the harm was self-inflicted. For example, in *Nopro*, a zoning case, the court held "Nopro's land investment was made in full knowledge of the zoning limitations. It took the calculated risk that it could break the zoning use barrier and thereby double the profit from its investment." *Nopro*, 180 Colo. at 227, 504 P.2d at 349. The court concluded "if hardship exists . . . it was incurred voluntarily by the choice of Nopro and was self-inflicted." *Id.* Likewise, in *Ford Leasing* and *Gold Run*, the court emphasized the fact that the owner bought the property having full knowledge of existing restrictive zoning, thus rendering a hardship of self-inflicting.

In this case, the majority asserts that The Mill was on notice that the radioactive materials present on the property were highly regulated at both the state and federal level, stating "the facts stipulated to by the parties in the regulatory taking action indicated that the entire property, including the mill yard, had been subject to federal licensing and regulation since 1962 due to the presence of radioactive contamination." Maj. op. at 1000. The majority maintains that even in 1973, when The Mill purchased the lot, there "existed an awareness that the hazards posed by radiation were potentially severe." *Id.* The majority's observation fails to fairly take into account two important realities: (1) in 1973, the extent of the potential

hazards posed by radiation was not fully understood; and (2) The Mill had no knowledge of the site's contamination at the time of its purchase due to its reliance upon CDH findings that the mill yard was uncontaminated and available for uses contemplated by The Mill.[23] These and other facts found by the trial court cannot be ignored. Where the findings of the trial court are supported by the record, those findings must be accepted on review unless they are clearly erroneous. *M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380, 1384 (Colo.1994). Because we have consistently disapproved of the substitution of new factual findings by reviewing courts for those made by the trial court, *Pace v. Clark,* 197 Colo. 306, 313, 592 P.2d 792, 796 (1979), and because the record clearly supports the findings of the trial court, it would be inappropriate on review to fail to take such facts into consideration.

The facts of this case deal with what was described during the trial as "a regulatory framework which has evolved over time to deal with our increase in knowledge of radiation and its dangers." As found by the trial court, the need to clean up areas such as the Gunnison uranium mill site was not "an overriding concern" in the early 1970's. Testimony shows that in 1971, cleanup efforts were done related to buildings and equipment, with an emphasis at that time on alpha contaminations. That same testimony indicates that since 1971, concerns have

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[23] The trial court held that The Mill "knew there had been a uranium mill on that site; and knew what was still there; that is to say, the tailings pile. The [Mill] did not know, at the time that it purchased, that there was radioactive contamination on the mill site itself." This finding is supported by the record.

grown for other types of radiation contamination, including radon contamination, radon progeny called radon daughters and gamma radiation. Although there were proper tools and equipment for testing for these types of other radiation problems in 1971, there was not a sufficient concern at that time for the dangers from these other radiation hazards. Thus, they were not part of the examination that was done prior to the delicensure in 1971. In fact, testimony indicated that in 1971, when the property in question was removed from licensure, CDH did not even consider it important enough to regulate the tailings pile, let alone the mill yard. Today, on the other hand, according to testimony which was introduced at trial, radiation is considered potentially harmful in any degree.

Before purchasing the property in 1973, The Mill fully researched the possibility of contamination on that site by reviewing CDH files in February of 1973. The Mill found that the site had been regulated at one time, but that the State had delicensed the parcel, representing that it was not contaminated, and authorizing its *unrestricted* use. After regulatory examination, the State demonstrated its approval of the storage use contemplated by The Mill, as well as any other reasonable uses. The record reflects that The Mill purchased the property based on an expectation created by the government. Given the fact that "scientific knowledge concerning the hazards of radiation was not as sophisticated as it is now," maj. op. at 1000, the State's representations were conceivable. It follows that The Mill's reliance on those representations was reasonable. Thus, in 1973, despite the fact that the mill yard remained subject to federal regulation, The

Mill's contemplated use of the property for storage, a use also contemplated by government officials after regulatory examination, was reasonable.

It is not disputed that the mill yard is contaminated and should be regulated by the state. The issue comes down to who should bear the cost of the government's intervention – the state or the private party. When a citizen relies on government records and the government later changes its position, the only logical solution is for the government to bear any costs involved.

IV

I would therefore find that the investment-backed expectations of The Mill based upon information from CDH were not highly unreasonable. Since the trial court's findings with respect to the remaining material facts are supported by the record, I would find a potentially compensable taking requiring that we determine issues not reached by the majority. For the foregoing reasons, I respectfully dissent.

APPENDIX B

THE MILL, Plaintiff-Appellant,

v.

STATE of Colorado, DEPARTMENT OF HEALTH, Defendant-Appellee.

THE MILL, Plaintiff-Appellee and Cross-Appellant,

v.

STATE of Colorado, DEPARTMENT OF HEALTH, Defendant-Appellant and Cross-Appellee.

DEPARTMENT OF HEALTH, State of Colorado, Petitioner-Appellee,

v.

THE MILL, Respondent-Appellant.

Nos. 87CA0502, 87CA0838 and 91CA0770.

Colorado Court of Appeals, Division II.

April 22, 1993.*

Rehearing Denied June 10, 1993.

Certiorari Granted March 7, 1994.

Owner of uranium-contaminated mill site brought action against Department of Health alleging inverse condemnation and regulatory taking. The District Court of the City and County of Denver, H. Jeffrey Bayless, J., awarded owner damages for temporary regulatory taking but dismissed claim for inverse condemnation. The Court

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* Prior opinion announced December 31, 1992 was Withdrawn. Petition for Rehearing of The Mill Granted. Petition for Rehearing of The State of Colorado Denied.

of Appeals, 787 P.2d 176, reversed and remanded. Certiorari was granted. The Supreme Court, 809 P.2d 434, reversed and remanded. On remand, case was consolidated with owner's appeal of order by the District Court, Gunnison County, Thomas J. Goldsmith, J., condemning property under Uranium Mill Tailings Radiation Control Act (UMTRCA). The Court of Appeals, Smith, J., sitting by assignment, held that: (1) in valuing properties designated under UMTRCA for purpose of determining just compensation in condemnation proceeding for remedial decontamination operations, rule against enhanced value does not apply; (2) stipulation which applied enhanced value rule was void as being contrary to law; and (3) trial court properly analyzed regulatory taking issue.

Affirmed in part and reversed and remanded in part.

Holley, Albertson & Polk, P.C., George Alan Holley, Eric E. Torgersen, Golden, for plaintiff-appellant, plaintiff-appellee and cross-appellant, and respondent-appellant.

Gale A. Norton, Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Jerry W. Goad, First Asst. Atty. Gen., Denver, for defendant-appellee, defendant-appellant and cross-appellee, and petitioner-appellee.

Opinion by Judge SMITH**.

** Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

In an initial consolidated appeal (87CA0502, 87CA0838), The Mill, a partnership, appealed the trial court's dismissal of its claim in inverse condemnation against the Department of Health (State), and both parties appealed the trial court's award to The Mill of $200,000 in damages for what the court determined to be a temporary regulatory taking. In that appeal, we reinstated The Mill's inverse condemnation claim against the State. *The Mill v. State*, 787 P.2d 176 (Colo. App.1989). However, on certiorari review, the Supreme Court reversed that ruling, and the matter is now before us on remand. *State of Colorado v. The Mill*, 809 P.2d 434 (Colo.1991).

In addition to the matters on remand, we have consolidated The Mill's appeal of the State's condemnation of The Mill property (91CA0770) under its newly acquired authority to take, by eminent domain, properties which have been designated under the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901 to 7942 (1988) (UMTRCA) as eligible for remedial action *See* § 25-11-303(1)(d)(III), C.R.S. (1989 Repl.Vol. 11A).

As to this latter appeal (91CA0770), we reverse the trial court's judgment and remand the cause for further proceedings.

In light of our disposition of the appeal in the eminent domain proceeding, the damage claim issues based upon "promissory estoppel" and "regulatory taking" theories are largely subsumed in that decision. We arrive at that conclusion because, even if there were a regulatory taking or if a promissory estoppel had arisen, the specific monetary damages arising therefrom could not exceed

the fair market value of the property. Thus, since the State will be required to pay the total fair market value of the property in the eminent domain proceeding, the issues in the other two cases are rendered moot, except as to the question concerning whether a regulatory taking occurred and, if so, when it occurred and the effect of such a taking upon the condemnation award. We affirm the trial court's findings and conclusion that a total regulatory taking occurred upon cancellation of the coal company lease in May of 1984.

The property at issue here consists of a 61-acre parcel that was, essentially, divided into two parts: The mill yard (roughly 25 acres) and the tailings pile (approximately 36 acres). The property was operated as a uranium and uranium mill tailings disposal site in the late 1950s and until 1962. This activity left the property and the buildings and equipment located on the property contaminated with radioactive material.

Milling operations were originally conducted pursuant to a license issued by the Atomic Energy Commission (AEC) which, after milling operations ceased, was reissued to permit only the storage on the property of past mill tailing products and contaminated equipment and buildings. The permit was again amended in 1968 to allow the transfer of decontaminated equipment. Also in 1968, the State was delegated authority by the AEC to regulate radioactive materials formerly under the jurisdiction of the AEC. In 1971, the State delicensed the mill yard and the property was authorized for unrestricted use.

In 1973, after reviewing all available governmental records regarding the property and discovering the foregoing information relative to the status of the property, The Mill purchased the entire 61 acres.

In 1978, as a result of the growing awareness of the potential public health hazards presented by uranium mill tailings, Congress passed UMTRCA for the purpose of cleaning up "designated" uranium processing sites. Under UMTRCA, processing sites would be either acquired by the State or decontaminated at the government's expense and returned to the property owner.

All 61 acres of The Mill's property were subsequently designated as a "processing site" under UMTRCA, and, in 1981, The Mill and the Department of Energy (DOE) entered into a limited agreement permitting DOE to test the 35-acre tailings pile. Nonetheless, testing was ultimately performed on all 61 acres and contamination of the 'delicensed' or unregulated mill yard was confirmed by the DOE in 1982.

In 1983, The Mill leased its property to O.C. Coal Company, primarily for the storage of coal, at a rental of $7,000 per month. Subsequent to being notified of this lease, the State began issuing The Mill a series of letters and communications which restricted the property's use for coal storage, and, in May of 1984, the coal company prematurely terminated its lease. Since then, The Mill has earned only approximately $500 to $700 a month from the mill yard based upon 20% building use.

Alleging that, because of the State's restrictions, the property could not be put to any reasonable economic use, The Mill filed a complaint in January 1986, alleging

three claims for relief: Inverse condemnation; a regulatory taking; and that the State was estopped to deny it the use of its property. The trial court subsequently dismissed The Mill's claim in inverse condemnation.

Upon trial of the remaining claims, the court ruled that the State had so diminished The Mill's right to use its property that it had effected a regulatory taking. Measuring damages in terms of "loss of use" over the period of time which the trial court anticipated decontamination of the property under UMTRCA would require, the court awarded The Mill $200,000.

While these issues were on appeal, the State initiated an action to condemn The Mill property in fee simple under § 25-11-303(1)(d), C.R.S. (1989 Repl.Vol. 11A). In response, The Mill moved for and was denied a dismissal or stay of the action pending the outcome of the consolidated appeal. Pursuant to a stipulation of the parties, the court determined that the fair market value of the property was zero, and it accordingly entered a "rule and order," or judgment, vesting title to The Mill property in the State.

I. 91CA0770

The eminent domain appeal

In its appeal of the eminent domain proceedings, The Mill contends that the trial court's judgment vesting the state with fee simple title to The Mill property must be vacated. We agree.

The record reveals that the "zero" award in the condemnation action here was the result of a stipulation

entered into by the parties in lieu of an evidentiary hearing under § 38-1-106, C.R.S. (1982 Repl.Vol. 16A). That stipulation entered into by The Mill and the State provided in relevant part:

> Decontaminating The Mill's property, which is presently contaminated with radioactive material, is a public purpose as set forth by statute in the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901 et seq. and the Colorado Radiation Control Act, § 25-11-301 et seq. C.R.S. In its present condition, the cost of remedial action and cleanup of The Mill's property to properly decontaminate it exceeds the fair market value which the property would otherwise have if completely uncontaminated. Therefore, in its present condition, the value of The Mill's property is zero.
>
> . . . .
>
> The Colorado Department of Health has the necessity for immediate possession of The Mill's property in order to commence the remedial action and decontamination operations which are the purpose of the present condemnation proceeding. (emphasis added)

A stipulation, like any other agreement between private parties, may be set aside if "there is a sound reason in law or equity" to do so. *See generally Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co.*, 698 P.2d 1340 (Colo.1985).

The stipulation is, by implication, a direct result of our decision in *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo.App.1989), in which, as here, the State sought to condemn property, like that at issue in this

appeal, heavily contaminated with radioactive uranium tailings and designated under UMTRCA as one of the specific sites eligible for remedial action. We held that the *Hecla* condemnation, likewise triggered by UMTRCA, was indisputably for a "public purpose."

Of critical importance, in *Hecla*, we also held that, as in other eminent domain proceedings, valuation of the condemned property was governed by the principle that an owner of land which is condemned is not entitled to recover the increase or enhancement in the value of his land which is caused by the very improvement for which the land is being acquired. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961). Determining that evidence of the value of Hecla's property in its uncontaminated condition would represent such an increase or enhancement in value, we ruled that, in ascertaining the fair market value of Hecla's property for the purpose of awarding just compensation, no evidence of the uncontaminated value of the condemned land was admissible even though, as here, in its contaminated condition, the value of the property was zero.

In short, *Hecla* was entirely dispositive of all the issues to be resolved by the court in The Mill's immediate possession hearing under § 38-1-106, C.R.S. (1982 Repl.Vol. 16A). Likewise, it was dispositive of the only other issue pending, that of determining the fair market value of the property being condemned.

Evaluating the parties' stipulation here, thus, necessarily compels us to re-evaluate our conclusion in *Hecla* that, in valuing UMTRCA properties for the purpose of

awarding just compensation, evidence of the uncontaminated value of the property was improper. Our analysis begins with an examination of the origin of both federal and State action, UMTRCA, and with an assessment of whether our holding in *Hecla* is consistent with this statutory scheme. We conclude that it is not and that, accordingly, the stipulation must be set aside.

The purpose of UMTRCA is clearly stated in the Act, that is, to stabilize and control residual uranium radioactive materials at certain specially identified, privately held, inactive mill sites that were previously producers of uranium for the federal government. 42 U.S.C. §§ 7901, 7911 (1988).

Provisions of UMTRCA reflect, if not a federal responsibility for the contamination of these mill sites, a federal *obligation* to stabilize and control the undisputed hazards of radioactivity. 42 U.S.C. § 7901 (1988). Accordingly, the statutory scheme vests considerable authority in the Secretary of the Department of Energy (Secretary) to complete remedial action at the designated sites promptly.

Implementation is to proceed under federal/state cooperative agreements which delegate to the states the "means" to access these privately held lands and to fund the remedial action required to achieve decontamination. 42 U.S.C. § 7913 (1988).

Specifically, UMTRCA provides that access will be obtained either through written consent of the property owner or, at the Secretary's determination, through "acquisition" of the site by the state. Funding will be 90% federal dollars and 10% state dollars. 42 U.S.C. § 7917

(1988). Significantly, *private owners* of sites that are not acquired through purchase or condemnation, are required to pay nothing for the consensual remedial cleanup of their property. *Hecla Mining Co. v. United States*, 909 F.2d 1371 (10th Cir.1990).

In short, the foregoing statutory scheme obligates the federal government, and to a lesser extent the state government, to undertake and to pay the costs of the remedial action compelled by the presence of unstable and uncontrolled uranium mill tailings.

However, application of the *Hecla* rule effectively predetermines the fair market value of any properties in which access for clean-up is obtained by a condemnation proceeding initiated under UMTRCA at zero or minimal value. This is true irrespective of the fact that the property owner may have a substantial investment in the property. Accordingly, the owner's investment becomes a casualty of, and hence, part of the "cost" of, remedial action.

Thus, we conclude that the *Hecla* rule, which precludes the admission of evidence of the value of UMTRCA properties in their uncontaminated state for the purpose of determining just compensation, is inconsistent with this statutory scheme because it results in imposing at least a portion of the cost of clean-up on the *property owner* rather than the federal and state governments.

In support of the result we reach here, it should be noted that UMTRCA provides that, before offering for public sale any processing sites which the state has acquired, the state shall offer to sell such lands at their

fair market value as *decontaminated* back to the person from whom they were acquired. 42 U.S.C. § 7914 (1988). Thus, if, as in the case of *Hecla, supra,* decontamination increases the value of the property from zero to $3.5 million, the original property owner, who received nothing or almost nothing for his property in the condemnation proceeding and who elects to reacquire the property under the statute, in effect, subsidizes the 'cost' of the remedial action.

The unfair and disparate treatment of the owners of designated sites is the inevitable result of applying traditional condemnation rules to UMTRCA condemnations. A similar result does not occur when access for remedial action is accomplished through UMTRCA's alternative means, that is, by obtaining the property owner's written consent. Indeed, the disparate treatment created between similarly situated property owners by application of the *Hecla* rule is further evidence that the traditional enhancement rule was not intended to apply under UMTRCA.

Thus, UMTRCA – the basis and authority for all federal and state action for remedial clean-up action on designated inactive uranium contaminated mill sites – does not support the rule announced in *Hecla, supra,* for valuation of UMTRCA properties subject to acquisition through condemnation. Condemnation in such instances is but one "means" to the "end" – remedial action undertaken solely at the federal government's initiative and predominately at its expense. Hence, condemnation, for the purpose of clean-up pursuant to UMTRCA, albeit proceeding under state law, must be consistent with his "end." Application of the *Hecla* rule would negate this consistency.

UMTRCA's legislative history further bolsters our conclusion. Nowhere in the extensive Congressional Committee reports discussing the federal law is the concept expressed, or even implied, that the property owner should be burdened by the cost, or any portion thereof, of the remedial action contemplated by the Act. Quite to the contrary, the focus of the Act is on the potential and significant radiation health hazard to the public that the tailings present and the federal government's lack of authority, absent this legislation, to stabilize and control this hazard.

The Act provides for an appropriation of funds and their expenditure under a shared cost formula which neither precludes state participation nor excessively burdens the federal budget. Indeed, in at least one committee report, it is specifically acknowledged that benefits to the property owner will accrue from the government's *voluntary remedial action* as provided by the Act. H.R.Rep. No. 95-1480, 95th Cong., 2d Session Pt. 2, at 7464 (1978) *reprinted in* U.S.Code Cong. & Admin.News 7450.

Therefore, in summary, based on UMTRCA's express statutory scheme for remedial action, interpreted in light of the Act's legislative history, we conclude that in valuing properties designated under 42 U.S.C. § 7912, for the purpose of determining just compensation in a condemnation proceeding for remedial decontamination operations under UMTRCA, the Congress intended that the rule against enhanced valuation set forth in *Williams, supra,* should not apply. To the extent that *Hecla, supra,* holds to the contrary, we feel compelled not to follow it.

The State advances several objections to our holding above. We conclude that none are persuasive.

First, the State argues that our analysis ignores specific reference to the applicability of the rule against enhanced value (§ 24-56-117(1)(c), C.R.S. (1988 Repl.Vol. 10B)) in the Radiation Control Act, § 25-11-301, et seq., C.R.S. (1989 Repl.Vol. 11A).

Inasmuch as 24-56-117(1)(c) is a codification of the rule against enhanced value, our preceding discussion mandates our conclusion that it is inapplicable here because it directly conflicts with, and defeats the purpose of, UMTRCA. To apply it in order to exclude evidence of the value these properties would have if the decontamination had been accomplished would reject the basic scheme of both UMTRCA and the State Radiation Control Act. We view this as the only conclusion consistent with § 25-11-303, C.R.S. (1988 Repl.Vol. 10B) which, in addition to authorizing state participation in UMTRCA, specifically provides that:

> [D]ecision[s] made pursuant to the provisions of article 1 of title 38, C.R.S., shall be made in accordance with the criteria established in § 24-56-117(1)(c), C.R.S. *and the provisions of the federal Uranium Mill Tailings Radiation Control Act of 1978.* (emphasis added)

Moreover, this conclusion is consistent with the distinction between acquisition for a public *improvement* and acquisition, as here, for a public *purpose* in the interest of the public health safety and welfare.

The former involves an anticipation that the property acquired will be put to a continuing public use, one

which is reasonably likely to enhance the value of the acquired or adjacent property. This related benefit resulting from public acquisition and use is absent when the acquisition of property is to eliminate a public health or safety hazard, like that underlying UMTRCA, because the property, at least at the time of condemnation, has no anticipated continuing public use. Indeed, UMTRCA specifically seeks in several ways to maintain private ownership of the properties designated for remedial action or to restore it to private use after decontamination. *See* 42 U.S.C. §§ 7913, 7914 (1988).

Accordingly, we conclude that § 24-56-117(1)(c), as it appears in the Radiation Control Act, must be interpreted as a general policy of state land acquisition which is modified, in this instance, by the specific policies for state land acquisition under UMTRCA.

Next, the state argues that allowing evidence of UMTRCA properties' uncontaminated value creates a special rule for one hazardous material but not for others. While this may be true, a review of the Act's legislative history indicates that this was precisely the Congress' intent.

Particularly revealing in this regard is the report of the House Congressional Committee on Interstate and Foreign Commerce which states in pertinent part:

> [T]he committee . . . stresses that it does not consider [UMTRCA] a precedent to be followed in the case of other waste management problems . . . [T]he situation at these inactive sites is quite unique in that there was once Federal licensing of the operations, but, due to a loophole in the law, the sites escaped control after

> operations ceased. Moreover, in each case, most, if not all, of the production was for Federal purposes.

H.R.Rep. No. 95-1480, 95th Cong., 2d Sess. Pt. 2, at 7457 [sic] (1978), *reprinted in* U.S.Code Cong. & Admin.News 7450.

In light of the foregoing discussion, we hold that the fair market value of properties, for the purpose of determining just compensation in a condemnation proceeding deemed necessary to commence remedial action and decontamination operations under UMTRCA, may properly include evidence of the value of the property if it were uncontaminated.

We also hold, because this determination is entirely contrary to *Hecla, supra,* that to enforce a stipulation, such as that entered into by The Mill and the State here, and which arose because of our decision in *Hecla,* would be manifestly unfair and unjust. Accordingly, we further hold that a sound reason in law exists to void the stipulation, and thus, we conclude that the trial court's judgment vesting title to The Mill property in the State based upon a "zero" valuation cannot stand.

II. 87CA0502 and 87CA0838

A. The damage award.

Both parties contest the trial court's $200,000 award to The Mill for what the court determined to be a temporary regulatory taking. We agree that this award, in light of subsequent events, was improper.

The State's temporary regulatory taking, if any, has evolved, by the State's election to proceed under its after-

acquired power of eminent domain, into a *permanent* taking which conclusively resolves the issue of the State's liability. Likewise, the condemnation action, with the exception of determining the date of possession, will also resolve the issue as to the appropriate measure of just compensation to be awarded. And, because the value determined in the condemnation action is based on a permanent taking and the property's fair market value in fee, it will necessarily equal or exceed any amount of damages that could be awarded as a result of any temporary regulatory taking. *See First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Falik & Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence,* 23 Real Property, Probate & Trust J. 1 (Spring 1988).

The damage judgment in 87CA0838 is therefore reversed.

B.

We also must address the correctness of the trial court's determination that a regulatory taking occurred in 1984, only for the limited purpose of ascertaining when possession of The Mill's property became vested in the State.

The date of possession is crucial to a determination of "just compensation" by the eminent domain court for two reasons. First, the fair market value of land taken in condemnation is generally determined as of the date the condemnor obtains possession, if that date precedes the date of the hearing to assess compensation. Section 38-1-114, C.R.S. (1982 Repl.Vol. 16A); *City of Glendale v.*

Rose, 679 P.2d 1096 (Colo.App.1983). Second, owners of condemned land are entitled to interest on the amount awarded as the value of the land from the date the condemning authority obtains the possessory interest in such land. *Evergreen Fire Protection District v. Huckeby*, 626 P.2d 744 (Colo.App.1981).

It is true that the date of possession, which triggers the right to compensation, is normally the date on which, as the statute says, "the petitioner is authorized by agreement, stipulation, or court order to take possession. . . ." Section 38-1-114. Nevertheless, the strict interpretation that possession can only occur based on contract or court order cannot, in our view, be applied when an actual change of possession has in fact occurred. To so hold would put form ahead of substance and would be fundamentally unfair.

The constitutional requirement of just compensation is derived as much from basic equitable principles of fairness as from technical concepts of property law. *Board of County Commissioners v. Delaney*, 41 Colo.App. 548, 592 P.2d 1338 (1978); *see Comparet v. U.S.*, 164 F.2d 452 (10th Cir.1947). Thus, under the circumstances here, if a regulatory taking which deprived The Mill of virtually any economic use of the property did in fact occur in May of 1984, the fair market value must be determined as of that time, and, inasmuch as no deposit has been made, interest must be awarded on the value determined from that date forward.

C. The Regulatory Taking

1.

Preliminarily, the State has argued that there can be no regulatory taking here because the letters and communications between the State and The Mill were advisory, not regulatory, in nature. The trial court implicitly rejected this argument, however, concluding that the letters and communications constituted a "pattern of restriction," in effect, limiting use which it concluded was tantamount to *regulation*. We agree with the trial court.

A review of the letters from the State to The Mill discloses that a significant number of them referred to the State's regulatory and licensing authority and The Mill's responsibilities thereunder. Moreover, at least one of the communications refers to The Mill's "non-compliance" with applicable regulatory and licensure requirements and directs The Mill to "take corrective steps . . . to avoid further non-compliance."

Clearly, the thrust and effect of these communications is both mandatory and prohibitive. Hence, we perceive no error in the trial court's determination that these communications could form the basis of a regulatory takings claim.

2.

Next, the State contends that the trial court's analysis of the "takings" issue was in error. We disagree.

a.

First, the State challenges the legal analysis undertaken by the trial court in evaluating The Mill's "takings" claim.

The State argues that, in its analysis, the trial court improperly considered and weighed the private economic interests implicated by the State's action. Such factors, the State argues, are not relevant when, as here, the State's actions are prompted by a compelling public interest, such as a substantial health hazard.

There is no set formula or clear rule which can generally be applied in analyzing a regulatory takings claim. *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo.1991); *Board of County Commissioners v. Flickinger*, 687 P.2d 975 (Colo.1984). Indeed, as our Supreme Court succinctly stated in *State Department of Highways v. Interstate Denver West*, 791 P.2d 1119 (Colo.1990):

> To distinguish between permitted regulation, when no compensation is required, and a taking which requires compensation [raises] conceptual, theoretical, and practical issues . . . which are difficult to resolve.

The distinguishing feature is often stated to be one of degree, that is, a determination that government regulation has gone "too far." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). This ultimate conclusion, in turn, is contingent on not one but several factors of "particular significance." *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

One factor is the "character" of the government's action. *Pennsylvania Central Transportation Co. v. New York City, supra.* Government action which can be viewed as a physical invasion may more readily be found to constitute a taking than when the action arises from "some public program adjusting the benefits and burdens of economic life to promote the common good." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

Another factor is, indeed, the nature or purpose of the government's actions. *See Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In particular, government regulation which prohibits an illegal misuse of private property (*Mugler v. Kansas,* 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed.205 (1887), or a use which is a nuisance or tantamount to a nuisance (*Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Keystone, supra*), does not require compensation, despite the fact that the regulations deprive the owner of a profitable or beneficial use of his property.

Yet another significant factor, however, is the economic impact of the government's actions on the use of the property regulated, including the interference of the government's action with investment-backed expectations. *Keystone, supra; Pennsylvania Central Transportation Co., supra.* If the government regulation has an "unduly harsh impact" on the owner's use of the property, *Pennsylvania Central Transportation Co., supra,* or destroys essential and legal uses, *Curtin v. Benson,* 222 U.S. 78, 32 S.Ct. 31, 56 L.Ed. 102 (1911), then the regulation is *constitutionally* onerous by "forcing some people alone to bear

public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). *See also Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Short, *The Impacts and Issues Surrounding the Regulatory Confiscation of Real Property*, 3 B.Y.U.J.Pub.L. 261 (1988).

The foregoing extensive precedent was available to the trial court at the time it made its decision in the instant case. Subsequent to that date the United States Supreme Court decided *Yee v. City of Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), reaffirming these principles, and *Lucas v. So. Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The latter case, in light of the prior precedent is dispositive of the specific issues here. In *Lucas*, the court stated that: "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, he has suffered a taking." ___ U.S. at ___, 112 S.Ct. at 2895, 120 L.Ed.2d at 815.

While the court in *Lucas* reiterated its requirement that a "taking" analysis was required, it announced a categorical rule to the effect that when the effect of government regulation, albeit in the public interest, is to extinguish all, or virtually all of the economic attributes of ownership, there is no theoretical justification upon which to deny compensation under the "takings" clause. *See generally* Berger, *The Year of the Taking Issue*, 1 B.Y.U.J.Pub.L. 261 (1987).

This clause *presupposes* that property is wanted for the public purpose but provides that it shall not be taken

for such use under the Constitution *without the payment of just compensation. See Pennsylvania Coal v. Mahon, supra.*

Furthermore, we hold that the scope of the trial court's analysis of the "takings" issue here was proper, particularly in light of the fact that *Lucas* had not yet been decided. Indeed, it closely and carefully tracked the multi-factored, pre *Lucas*, legal standard set forth above. Acknowledging the difficulties in evaluating a "takings" claim based on a series of restrictive acts, the trial court's analysis focused on three areas: The public interests triggering the State's actions; the private interests it affected; and, finally, upon whom the "costs" occasioned by these competing interests should fall.

Moreover, the trial court acknowledged that the State's actions coincided with an "evolution of knowledge" regarding the hazards of radiation which began after the mill yard was delicensed. The court also noted that the current state of knowledge *now* indicated that there is "no known safe level of radiation" and that, hence, the thoroughly contaminated mill property, in its present condition, was indeed unsafe for general public access.

Next, the trial court explored the economic effects of the State's interference. In doing so, the court noted that The Mill had purchased the property as a speculative venture, expecting that the property would appreciate. The trial court then noted that since 1973, the use and planned use of the mill yard had been primarily storage. However, even this use had become, through the directives issued by the State, limited to buildings in the yard covered with concrete and a 50-foot strip alongside.

Moreover, the trial court found this limitation on use was a direct cause for termination of the coal company's lease, a loss of $7000 per month.

Finally, the trial court engaged in an express public-private interest analysis to determine who should bear the "costs" associated with the State's action in the public interest and The Mill's ensuing loss of use. Here, the trial court specifically found that the public interest outweighed the private interests of The Mill and recognized The Mill's lack of participation in any nuisance-like use of the property.

Briefly, the findings and conclusions of the trial court reveal that it recognized the need for a State response to the radiation despite its lack of knowledge regarding the hazard posed by radiation contamination at the time The Mill purchased the property. The trial court concluded that the total economic deprivation caused by the State's restriction on The Mill's use of the property should not fall on the owner. Accordingly, the trial court ruled that the State's series of regulatory letters and communications had, indeed, effected a total regulatory "taking" in May of 1984.

In sum, we hold that the trial court did not err in its legal analysis of the "takings" issue. Specifically, upon recognizing the compelling public health hazard presented by The Mill's radiation contamination, the trial court properly proceeded in its analysis to consider and weigh the private economic interests implicated by the State's response to this hazard.

b.

Next, the State argues that the trial court's factual assessments relating to the foregoing "significant factors" were not supported by the evidence. Specifically, the State argues that the trial court erred in finding that, based on the radiation hazard and the resulting restriction on its use imposed by the State, the mill yard could be put to no economic use and had no value.

When sitting as a finder of fact, the trial court is the sole determiner of the sufficiency, credibility, weight of the evidence, and the inferences and conclusions to be drawn therefrom. *Cottonwood Hill, Inc., v. Ansay,* 709 P.2d 62 (Colo.App.1985). Hence, only in instances in which the trial court's determination of these issues finds no support in the record will an appellate court substitute its judgment for that of the trial court. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (Colo.1979).

Such is clearly not the case here. The trial court's finding of no viable economic use and consequent loss of value was confirmed by the testimony of a number of expert witnesses. Two experts testified that the entire 61 acres was contaminated to a level that would require not only the demolition of existing buildings but also the removal of the top soil. Moreover, while some testimony did indicate that some portion of the property could still be used for storage, even this use was questionable in light of other testimony establishing unacceptable levels of radiation within these structures. Finally, the State's own communication to The Mill in 1984 further established that virtually none of The Mill's property was free enough from surface contamination to be useable for

storage without compromising the acceptability of the stored goods.

In short, the trial court's finding of no remaining viable economic use and consequent determination of "no value" was supported by the record. We are bound by these findings.

In conclusion, we perceive no error in either the trial court's analysis or conclusion that the state's restrictive actions, under the particular circumstances of this case, amounted to a total regulatory taking.

The trial court's judgment in 91CA0770 vesting title to The Mill property in the State is reversed, and the cause is remanded for a new determination of just compensation in the condemnation proceeding consistent with the views expressed in this opinion. The trial court's determination in the consolidated appeal of cases 87CA0502 and 87CA0838 that a regulatory taking occurred and the effective date of that taking are affirmed. The issues remaining in those appeals are rendered moot by the State's subsequent proceeding in eminent domain.

PLANK and HUME, JJ., concur.

APPENDIX C

COLORADO COURT OF APPEALS
No. 87CA0502
No. 87CA0838
No. 91CA0770

December 31, 1992

The Mill,

Plaintiff-Appellant,

v.

State of Colorado, Department of Health,

Defendant-Appellee,

and

The Mill,

Plaintiff-Appellee and Cross-Appellant,

v.

State of Colorado, Department of Health,

Defendant-Appellant and Cross-Appellee,

and

Department of Health, State of Colorado,

Petitioner-Appellee,

v.

The Mill,

Respondent-Appellant.

Appeal from the District Court of the City
and County of Denver
Honorable H. Jeffrey Bayless, Judge
No. 86CV3945

and

Appeal from the District Court of Gunnison County
Honorable Thomas J. Goldsmith
No. 89CV116

Division II
Opinion by JUDGE SMITH
Plank and Hume, JJ., concur

JUDGMENT REVERSED
AND CAUSES
REMANDED WITH
DIRECTIONS

Holly, Albertson & Polk, P.C., George Alan Holley, Eric E. Torgersen, Golden, Colorado for the Plaintiff-Appellant, Plaintiff-Appellee and Cross-Appellant, and Respondent-Appellant

Gale A. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Jerry W. Goad, First Assistant Attorney General, Denver, Colorado, for Defendant-Appellee, Defendant-Appellant and Cross-Appellee, and Petitioner-Appellee

In an initial consolidated appeal (87CA0502, 87CA0838), The Mill, a partnership, appealed the trial court's dismissal of its claim in inverse condemnation against the Department of Health (State), and both parties appealed the trial court's award to The Mill of $200,000 in damages for what the court determined to be a temporary regulatory taking. In that appeal, we reinstated the Mill's inverse condemnation claim against the State. *The Mill v. State*, 787 P.2d 176 (Colo. App. 1989). However, on certiorari review, the Supreme Court

reversed that ruling, and the matter is now before us on remand. *State of Colorado v. The Mill,* 809 P.2d 434 (Colo. 1991).

In addition to the matters on remand, we have consolidated The Mill's appeal of the State's condemnation of The Mill property (91CA0770) under its newly acquired authority to take, by eminent domain, properties which have been designated under the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§7901 to 7942 (1988) (UMTRCA) as eligible for remedial action. *See* §25-11-303(1)(d)(III) C.R.S. (1989 Repl. Vol. 11A).

As to this latter appeal (91CA0770), we reverse the trial court's judgment and remand the cause for further proceedings.

We decline to address the issues remaining in the consolidated appeal (87CA0502 & 87CA0838) on the ground that, in light of our disposition of the subsequent eminent domain case, the issues as to whether there was promissory estoppel or a regulatory "taking" and the damages to be assessed therefor are subsumed in that case. We arrive at that conclusion because, even if there were a regulatory taking or if a promissory estoppel had arisen, the damages arising therefrom could not exceed the fair market value of the property. Thus, since the State will be required to pay the total fair market value of the property in the eminent domain proceeding, the issues in the other two cases are rendered moot.

Prior to the 1989 condemnation proceeding, The Mill was the owner of a 61-acre parcel of property which was, essentially, divided into two parts: The mill yard (roughly 25 acres) and the tailings pile (approximately 36 acres).

The property operated as a uranium and uranium mill tailings disposal site in the late 1950s and until 1962. This activity left the property and the buildings and equipment located on the property contaminated with radioactive material.

Milling operations were originally conducted pursuant to a license issued by the Atomic Energy Commission (AEC) which, after milling operations ceased, was reissued to permit only the storage on the property of past mill tailing products and contaminated equipment and buildings. The permit was again amended in 1968 to allow the transfer of decontaminated equipment. Also in 1968, the State was delegated authority by the AEC to regulate radioactive materials formerly under the jurisdiction of the AEC. In 1971, the State 'delicensed' the mill yard and the property was authorized for unrestricted use.

In 1973, after reviewing all available governmental records regarding the property and discovering the foregoing information relative to the status of the property, The Mill purchased the entire 61 acres.

In 1978, as a result of the growing awareness of the potential public health hazards presented by uranium mill tailings, Congress passed UMTRCA for the purpose of cleaning up "designated" uranium processing sites. Under UMTRCA, processing sites would be either acquired by the state or decontaminated at the government's expense and returned to the property owner.

All 61 acres of The Mill's property were subsequently designated as a "processing site" under UMTRCA, and, in 1981, The Mill and the Department of Energy (DOE)

entered into a limited agreement permitting DOE to test the 35 acre tailings pile. Nonetheless, testing was ultimately performed on all 61 acres and contamination of the 'delicensed' or unregulated mill yard was confirmed in 1982.

In 1983, The Mill leased its property to O.C. Coal Company, primarily for the storage of coal, at a rental of $7,000 per month. Subsequent to being notified of this lease, the State began issuing The Mill a series of letters and communications which restricted the property's use for coal storage, and, in 1984, the coal company prematurely terminated its lease. Since then, The Mill has earned only approximately $500 to $700 a month from the mill yard based upon 20% building use.

Alleging that, because of the State's restrictions, the property could not be put to any reasonable economic use, The Mill filed a complaint in January 1986, alleging three claims for relief: Inverse condemnation; a regulatory taking; and that the State was estopped to deny it the use of its property. The trial court subsequently dismissed The Mill's claim in inverse condemnation.

Upon trial of the remaining claims, the court ruled that the State had so diminished The Mill's right to use its property that it had effected a regulatory taking. Measuring damages in terms of "loss of use" over the period of time which the trial court anticipated decontamination of the property under UMTRCA would require, the court awarded The Mill $200,000.

While these issues were on appeal, the State initiated an action to condemn The Mill property in fee simple under §25-11-303(1)(d), C.R.S. (1989 Repl. Vol. 11A). In

response, The Mill moved for and was denied a dismissal or stay of the action pending the outcome of the consolidated appeal. Pursuant to a stipulation of the parties, the court determined that the fair market value of the property was zero, and it accordingly entered a 'rule and order', or judgment, vesting title to The Mill property in the State.

I.

In its appeal of the eminent domain proceedings, The Mill contends that the trial court's judgment vesting the State with fee simple title to The Mill property must be vacated. We agree.

The record reveals that the "zero" award in the condemnation action here was the result of a stipulation entered into by the parties in lieu of an evidentiary hearing under §38-1-106, C.R.S. (1982 Repl. Vol. 16A). That stipulation entered into by the Mill and the State provided in relevant part:

> Decontaminating The Mill's property, which is presently contaminated with radioactive material, is a public purpose as set forth by statute in the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §7901 et seq. and the Colorado Radiation Control Act, §25-11-301 et seq. C.R.S.
>
> In its present condition, the cost of remedial action and cleanup of The Mill's property to properly decontaminate it exceeds the fair market value which the property would otherwise have if completely uncontaminated. Therefore, in its present condition, the value of The Mill's property is zero.

. . .

> The Colorado Department of Health has the necessity for immediate possession of The Mill's property in order to commence the remedial action and decontamination operations which are the purpose of the present condemnation proceeding. (emphasis added)

A stipulation, like any other agreement between private parties, may be set aside if "there is a sound reason in law or equity" to do so. *See generally Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co.*, 698 P.2d 1340 (Colo. 1985).

The stipulation is, by implication, a direct result of our decision in *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989), in which, as here, the State sought to condemn property, like that at issue in this appeal, heavily contaminated with radioactive uranium tailings and designated under UMTRCA as one of the specific sites eligible for remedial action. We held that the *Hecla* condemnation, likewise triggered by UMTRCA, was indisputably for a "public purpose."

Of critical importance, in *Hecla*, we also held that, as in other eminent domain proceedings, valuation of the condemned property was governed by the principle that an owner of land which is condemned is not entitled to recover the increase or enhancement in the value of his land which is caused by the very improvement for which the land is being acquired. *Williams v. City & County of Denver*, 147 Colo. 195, 363 P.2d 171 (1961). Determining that evidence of the value of Hecla's property in its uncontaminated condition would represent such an

increase or enhancement in value, we ruled that, in ascertaining the fair market value of Hecla's property for the purpose of awarding just compensation, no evidence of the uncontaminated value of the condemned land was admissible even though, as here, in its contaminated condition, the value of the property was zero.

In short, *Hecla* was entirely dispositive of all the issues to be resolved by the court in The Mill's immediate possession hearing under §38-1-106, C.R.S. (1982 Repl. Vol. 16A). Likewise, it was dispositive of the only other issue pending, that of determining the fair market value of the property being condemned.

Evaluating the parties' stipulation here, thus, necessarily compels us to re-evaluate our conclusion in Hecla that, in valuing UMTRCA properties for the purpose of awarding just compensation, evidence of the uncontaminated value of the property was improper. Our analysis begins with an examination of the origin of both federal and state action, UMTRCA, and with an assessment of whether our holding in *Hecla* is consistent with this statutory scheme. We conclude that it is not and that, accordingly, the stipulation must be set aside.

The purpose of UMTRCA is clearly stated in the Act, that is, to stabilize and control residual uranium radioactive materials at certain specially identified, privately held, inactive mill sites that were previously producers of uranium for the federal government. 42 U.S.C. 7901, 7911 (1988).

Provisions of UMTRCA reflect, if not a federal responsibility for the contamination of these mill sites, a federal *obligation* to stabilize and control the undisputed

hazards of radioactivity. 42 U.S.C. §7901 (1988). Accordingly, the statutory scheme vests considerable authority in the Secretary of the Department of Energy (Secretary) to complete remedial action at the designated sites promptly.

Implementation is to proceed under federal/state cooperative agreements which delegate to the states the "means" to access these privately held lands and to fund the remedial action required to achieve decontamination. 42 U.S.C. §7913 (1988).

Specifically, UMTRCA provides that access will be obtained either through written consent of the property owner or, at the Secretary's determination, through "acquisition" of the site by the state. Funding will be 90% federal dollars and 10% state dollars. 42 U.S.C. §7917 (1988). Significantly, *private owners* of sites that are not acquired through purchase or condemnation, are required to pay nothing for the consensual remedial cleanup of their property. *Hecla Mining Co. v. United States*, 909 F.2d 1371 (10th Cir. 1990).

In short, the foregoing statutory scheme obligates the federal government, and to a lesser extent the state government, to undertake and to pay the costs of the remedial action compelled by the presence of unstable and uncontrolled uranium mill tailings.

However, application of the *Hecla* rule effectively predetermines the fair market value of any properties in which access for clean-up is obtained by a condemnation proceeding initiated under UMTRCA at zero or minimal value. This is true irrespective of the fact that the property owner may have a substantial investment in the

property. Accordingly, the owner's investment becomes a casualty of, and hence, part of the "cost" of, remedial action.

Thus, we conclude that the *Hecla* rule, which precludes the admission of evidence of the value of UMTRCA properties in their uncontaminated state for the purpose of determining just compensation, is inconsistent with this statutory scheme because it results in imposing at least a portion of the cost of clean-up on the *property owner* rather than the federal and state governments.

In support of the result we reach here, it should be noted that UMTRCA provides that, before offering for public sale any processing sites which the state has acquired, the state shall offer to sell such lands at their fair market value as *decontaminated* back to the person from whom they were acquired. 42 U.S.C. §7914 (1988). Thus, if, as in the case of *Hecla, supra,* decontamination increases the value of the property from zero to $3.5 million, the original property owner, who received nothing or almost nothing for his property in the condemnation proceeding and who elects to reacquire the property under the statute, in effect, subsidizes the 'cost' of the remedial action.

The unfair and disparate treatment of the owners of designated sites is the inevitable result of applying traditional condemnation rules to UMTRCA condemnations. A similar result does not occur when access for remedial action is accomplished through UMTRCA's alternative means, that is, by obtaining the property owner's written consent. Indeed, the disparate treatment created between

similarly situated property owners by application of the *Hecla* rule is further evidence that the traditional enhancement rule was not intended to apply under UMTRCA.

Thus, UMTRCA – the basis and authority for all federal and state action for remedial clean-up action on designated inactive uranium contaminated mill sites – does not support the rule announced in *Hecla, supra,* for valuation of UMTRCA properties subject to acquisition through condemnation. Condemnation in such instances is but one "means" to the "end" – remedial action undertaken solely at the federal government's initiative and predominately at its expense. Hence, condemnation, for the purpose of clean-up pursuant to UMTRCA, albeit proceeding under state law, must be consistent with this "end." Application of the *Hecla* rule would negate this consistency.

UMTRCA's legislative history further bolsters our conclusion. Nowhere in the extensive Congressional Committee reports discussing the federal law is the concept expressed, or even implied, that the property owner should be burdened by the cost, or any portion thereof, of the remedial action contemplated by the Act. Quite to the contrary, the focus of the Act is on the potential and significant radiation health hazard to the public the tailings present and the federal government's lack of authority, absent this legislation, to stabilize and control this hazard.

The Act provides for an appropriation of funds and their expenditure under a shared cost formula which neither precludes state participation nor excessively burdens the federal budget. Indeed, in at least one committee

report, it is specifically acknowledged that benefits to the property owner will accrue from the government's *voluntary remedial action* as provided by the Act. H.R. Rep. No. 95 – 1480, 95th Cong., 2d Session Pt. 2, at 7464 [sic] (1978) *reprinted in* U.S. Code Cong. & Admin. News 7450.

Therefore, in summary, based on UMTRCA's express statutory scheme for remedial action, interpreted in light of the Act's legislative history, we conclude that in valuing properties designated under 42 U.S.C. §7912, for the purpose of determining just compensation in a condemnation proceeding for remedial decontamination operations under UMTRCA, the Congress intended that the rule against enhanced valuation set forth in *Williams, supra,* should not apply. To the extent that *Hecla, supra,* holds to the contrary, we feel compelled not to follow it.

The State advances several objections to our holding above. We conclude that none are persuasive.

First, the State argues that our analysis ignores specific reference to the applicability of the rule against enhanced value (§24-56-117(1)(c), C.R.S. (1988 Repl. Vol. 10B)) in the Radiation Control Act, §25-11-301, et seq. C.R.S. (1989 Repl. Vol. 11A).

Inasmuch as 24-56-117(1)(c) is a codification of the rule against enhanced value, our preceding discussion mandates our conclusion that it is inapplicable here because it directly conflicts with, and defeats the purpose of, UMTRCA. To apply it in order to exclude evidence of the value these properties would have if the decontamination had been accomplished would reject the basic scheme of both UMTRCA and the State Radiation Control Act. We view this as the only conclusion consistent with

§25-11-303, C.R.S. (1988 Repl. Vol. 10B) which, in addition to authorizing state participation in UMTRCA, specifically provides that:

> [D]ecision[s] made pursuant to the provisions of article 1 of title 38, C.R.S., shall be made in accordance with the criteria established in §24-56-117(1)(c), C.R.S. *and the provisions of the federal "Uranium Mill Tailings Radiation Control Act of 1978."* (emphasis added)

Moreover, this conclusion is consistent with the distinction between acquisition for a public *improvement* and acquisition, as here, for a public *purpose* in the interest of the public health safety and welfare.

The former involves an anticipation that the property acquired will be put to a continuing public use, one which is reasonably likely to enhance the value of the acquired or adjacent property. This related benefit resulting from public acquisition and use is absent when the acquisition of property is to eliminate a public health or safety hazard, like that underlying UMTRCA, because the property, at least at the time of condemnation, has no anticipated continuing public use. Indeed, UMTRCA specifically seeks in several ways to maintain private ownership of the properties designated for remedial action or to restore it to private use after decontamination. *See* 42 U.S.C. §§7913, 7914 (1988).

Accordingly, we conclude that §24-56-117(1)(c) as it appears in the Radiation Control Act, must be interpreted as a general policy of state land acquisition which is modified, in this instance, by the specific policies for state land acquisition under UMTRCA.

Next, the state argues that allowing evidence of UMTRCA properties' uncontaminated value creates a special rule for one hazardous material but not for others. While this may be true, a review of the Act's legislative history indicates that this was precisely the Congress' intent.

Particularly revealing in this regard is the report of the House Congressional Committee on Interstate and Foreign Commerce which states in pertinent part:

> [T]he committee . . . stresses that it does not consider [UMTRCA] a precedent to be followed in the case of other waste management problems . . . [T]he situation at these inactive sites is quite unique in that there was once Federal licensing of the operations, but, due to a loophole in the law, the sites escaped control after operations ceased. Moreover, in each case, most, if not all, of the production was for Federal purposes.

H.R. Rep. No. 95-1480, 95th Cong., 2d Sess. Pt. 2, at 7457 [sic] (1978), *reprinted in* U.S. Code Cong. & Admin. News 7450.

In light of the foregoing discussion, we hold that the fair market value of properties, for the purpose of determining just compensation in a condemnation proceeding deemed necessary to commence remedial action and decontamination operations under UMTRCA, may properly include evidence of the value of the property if it were uncontaminated.

We also hold, because this determination is entirely contrary to *Hecla, supra,* that to enforce a stipulation, such as that entered into by The Mill and the State here, and which arose because of our decision in *Hecla,* would be

manifestly unfair and unjust. Accordingly, we further hold that a sound reason in law exists to void the stipulation, and thus, we conclude that the trial court's judgment vesting title to The Mill property in the State based upon a "zero" valuation cannot stand.

II.

Both parties contest the trial court's $200,000 award to The Mill for what the court determined to be a temporary regulatory taking.

We decline to address these arguments. The State's temporary regulatory taking, if any, has evolved, by the State's election to proceed under its after-acquired power of eminent domain, into a *permanent* taking which conclusively resolves the issue of the State's liability. Likewise, the condemnation action will also resolve the issue as to the appropriate measure of damages. And, because the value determined in the condemnation action is based on a permanent taking and the property's fair market value in fee, it will necessarily equal or exceed any amount of damages that could be awarded as a result of a temporary regulatory taking. *See First Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Falik & Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence,* 23 Real Property, Probate & Trust Journal 1 (Spring 1988).

In sum, determination of the liability and damages issues in the consolidated appeal would be a futile act. Hence, we are under no obligation to and, indeed, decline to, address these issues on appeal.

The trial court's judgment in 91CA0770 vesting title to The Mill property in the State is reversed, and the cause is remanded for a new determination of just compensation in the condemnation proceeding consistent with the views expressed in this opinion. We have declined to address the issues raised in the consolidated appeal, 87CA0502 and 87CA0838, on the ground that the issues raised therein are rendered moot by the State's subsequent proceeding in eminent domain, and thus, those cases are remanded to the trial court with directions that they be dismissed.

JUDGE PLANK and JUDGE HUME concur.

APPENDIX D

STATE of Colorado, DEPARTMENT OF HEALTH, Petitioner,

v.

THE MILL, a limited partnership, Respondent.

No. 89SC575.

Supreme Court of Colorado, En Banc.

April 8, 1991.
Rehearing Denied May 6, 1991.

Owner of uranium-contaminated mill site brought action against Department of Health alleging inverse condemnation and regulatory taking. The District Court of the City and County of Denver, H. Jeffrey Bayless, J., awarded owner damages for temporary regulatory taking but dismissed claim for inverse condemnation. Appeal and cross appeal were taken. The Court of Appeals, 787 P.2d 176, reversed and remanded with directions. Certiorari was granted. The Supreme Court, Mullarkey, J., held that: (1) owner could not maintain inverse condemnation action against state agency where agency did not have condemnation power at time of regulatory taking, and (2) claims for regulatory taking and promissory estoppel were not subsumed in inverse condemnation action and could be maintained after dismissal of inverse condemnation claim.

Reversed and remanded.

Gale A. Norton, Atty. Gen., Timothy M. Tymkovich, Sol. Gen., Raymond T. Slaughter, Chief Deputy Atty.

Gen., Jerry W. Goad, First Asst. Atty. Gen., Natural Resources Section, Denver, for Petitioner.

Thomas Fenton Smith, Pitkin County Atty., Aspen, and Marion A. Brewer, General Counsel, Colorado Counties, Inc., Denver, for amicus curiae Colorado Counties, Inc.

George Alan Holley, Eric E. Torgersen, Holley, Albertson & Polk, P.C., Golden, for respondent.

Justice MULLARKEY delivered the Opinion of the Court.

We granted certiorari to review *The Mill v. State*, 787 P.2d 176 (Colo.Ct.App.1989). We conclude that the court of appeals erred in holding, first, that the owner of a uranium-contaminated mill site could bring an inverse condemnation action against a state agency which had no condemnation authority, and, second, that the owner's claims for regulatory taking and promissory estoppel were subsumed in the inverse condemnation claim. We reverse and remand to the court of appeals for further proceedings consistent with this opinion.

I.

This case primarily involves a twenty-five acre portion (the "mill yard") of a parcel of property owned by the respondent, The Mill. The property is adjacent to the Gunnison, Colorado airport and through the 1950s and until 1962, the entire property was used for uranium milling operations. In 1968, the State of Colorado obtained regulatory jurisdiction from the federal government for abandoned uranium mills and tailings piles and

reposed that authority in the Colorado State Department of Health ("CSDH"). Colorado Ventures, which had purchased the property in 1964, performed a radiation decontamination process on the mill yard and, in 1971, CSDH authorized the mill yard for unrestricted use. The Mill purchased the property in 1973, relying on the State's certification that the mill yard was free from contamination and safe for unrestricted use.[1]

In 1978, Congress passed the Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 U.S.C. §§ 7901-7942 (1978). The purposes of UMTRCA included decontamination of specific uranium processing sites and protection of the public from the hazards of uranium contamination. 42 U.S.C. § 7901. Under UMTRCA the entire property owned by The Mill was designated as a "processing site" and was eligible for remedial action. The Colorado legislature empowered CSDH to participate in UMTRCA in 1979. Ch. 269, sec. 1, § 25-11-303(1), 1979 Colo.Sess.Laws 1069; § 25-11-303(1), 11 C.R.S. (1982).

In January 1983, The Mill leased the entire property to O.C. Coal Company at a rate of $7,000 per month. After The Mill notified CSDH of the lease, CSDH responded by issuing a series of letters and communications restricting use of the property. The restrictions included: limiting coal storage in a building on the mill yard to those portions of the building floor covered by concrete; restricting use of the exterior part of the mill

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[1] At the time of purchase, The Mill knew that the remainder of the property was contaminated and that its use was restricted.

yard to a 50-foot strip along the boundary of the property; prohibiting the building of new structures. A radiation survey performed in October 1983 showed that the soil on the mill yard contained levels of radiation in excess of acceptable exposure levels as set by CSDH and the Environmental Protection Agency. The restrictions placed on the property by CSDH directly impacted The Mill's lease agreement and O.C. Coal terminated the lease in 1984. Since the termination of the lease, the total yearly rental income from the property has been less than the amount which The Mill has paid as property taxes (approximately $5,100 per year). The trial court stated that it did not believe the property had "any value at all."

The Mill filed this action in January 1986, seeking to recover on theories of inverse condemnation, regulatory taking, and promissory estoppel. The Mill alleged that as a result of the restrictions which CSDH placed upon the property, The Mill was precluded from putting the property to any viable economic use. CSDH was expressly granted authority to condemn under the Radiation Control Act, Ch. 195, sec. 1, § 25-11-303(1)(d)(III), 1986 Colo.Sess.Laws 980, 980-81; § 25-11-303(1)(d)(III), 11A C.R.S. (1989), in May 1986. The trial court dismissed The Mill's inverse condemnation claim on the ground that CSDH did not have authority to condemn at the time of the alleged taking.

The trial court concluded that the State's restrictions on The Mill's property constituted a taking and awarded The Mill $200,000 based on loss of use of the mill yard. It was expected at the time of trial that the property would be cleaned under UMTRCA and restored to full use. Thus, the trial court awarded loss of use damages from

May 1984, when O.C. Coal terminated its lease, through 1993, when the trial court estimated clean-up operations would be completed and use of the property would be restored.[2] CSDH since has sought to condemn the entire property and that proceeding is pending. The stipulated value of the property in the condemnation proceeding was $0.

The State appealed the judgment on the grounds that the claim was not ripe, The Mill had not been deprived of all use of its property, and that even if The Mill had been deprived of all use of its property, the deprivation was a valid exercise of police power and therefore was not compensable. The Mill cross-appealed, arguing that the dismissal of the inverse condemnation claim was not proper because the State was taking its property on a reoccurring basis. The court of appeals reversed the trial court's dismissal of the inverse condemnation claim on the basis that CSDH's actions constituted a continuous taking. *The Mill*, 787 P.2d at 180. The court of appeals also held that all other claims and defenses were subsumed in the inverse condemnation claim. *Id.* at 181. Accordingly, the court of appeals did not address any other issues and remanded the case to the trial court for resolution of The Mill's inverse condemnation claim. *Id.*

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[2] This was the proper measure of damages under the facts as understood at the time. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987) (in the case of a temporary regulatory taking, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during [the taking]").

We granted certiorari on the following two issues:

> Did the court of appeals err when it ruled that there may be a "continuous" taking in an inverse condemnation action?
>
> Did the court of appeals err in merging all claims and defenses into a single inverse condemnation claim, thus barring defenses otherwise available?

We hold that there can be no continuous taking in an inverse condemnation action and also hold that the court of appeals erred in merging all claims and defenses into The Mill's inverse condemnation claim.

II.

The Colorado and United States Constitutions forbid the taking of private property without just compensation. U.S. Const. amend. V;[3] Colo. Const. art. II, § 15. Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980).

The following proposition, however, is well-settled in Colorado:

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[3] The Fifth Amendment applies to the states through the Fourteenth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310 n. 4, 107 S.Ct. 2378, 2383 n. 4, 96 L.Ed.2d 250 (1987). *See also Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

> Where there is no power on the part of a state agency to condemn private property for a claimed public use, a property owner whose property has been damaged by such agency cannot be held to have commenced an action for "inverse condemnation" when he seeks to recover the damages actually sustained by him. There can be no "inverse condemnation" in a situation where no right exists in the governmental agency to proceed under eminent domain.

Collopy v. Wildlife Comm'n, 625 P.2d 994, 1005 (Colo.1981) (quoting *Game and Fish Comm'n v. Farmers Irrigation Co.*, 162 Colo. 301, 310, 426 P.2d 562, 566 (1967)). *See also* J. Sackman, *Nichols on Eminent Domain*, § 8.1[4] ("The remedy of inverse condemnation, by the very premise which gives rise to it, is available only as against defendants who possess the power of eminent domain."). *But see Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043-44 (11th Cir.1982) ("If official authorities act on behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments [of the United States Constitution] and are subject to an inverse condemnation suit. As long as the state acts through one of its arms in such a way as to deprive an individual of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power.") (citation omitted).

The Mill contends that CSDH was given the power of eminent domain by the 1979 statute empowering CSDH to participate in UMTRCA. We disagree. We have

adopted the following analysis for determining whether an authority has been given the power of eminent domain:

> The authority to condemn must be expressly given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language. . . . If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the property should be acquired by contract.

Board of County Comm'rs v. Intermountain Rural Electric Ass'n, 655 P.2d 831, 834 (Colo.1982) (quoting *Mack v. Town of Craig*, 68 Colo. 337, 338-39, 191 P. 101 (1920)). In addition, we have held that the power to "acquire land . . . , by purchase or otherwise," did not confer authority to condemn. *Town of Eaton v. Bouslog*, 133 Colo. 130, 132, 292 P.2d 343, 344 (1956).

The 1979 statute authorized CSDH to "acquire and dispose of any designated processing site, including any interest in such site, and any site to be used for the permanent disposition and stabilization of residual radioactive materials." Ch. 269, sec. 1, § 25-11-303(1)(d), 1979 Colo.Sess.Laws 1069, 1070; § 25-11-303(1)(d), 11 C.R.S. (1982). The 1986 amendment to the statute explicitly authorized CSDH to obtain property through condemnation proceedings. Ch. 195, sec. 1, § 25-11-303(1)(d)(III), 1986 Colo.Sess.Laws 980, 981; § 25-11-303(1)(d)(III), 11 A C.R.S. (1989).

Under the above authorities, the 1979 statute did not confer on CSDH the power of eminent domain. The 1979

statute merely gave CSDH the power to "acquire" property. It contained no mention of any authority on the part of CSDH to condemn. We therefore conclude that CSDH was not authorized to acquire property through condemnation until section 25-11-303 was amended in 1986 to expressly confer this condemnation power.

The court of appeals reinstated The Mill's inverse condemnation claim on the theory that the regulatory taking continued through May 1986, when CSDH expressly obtained the power to condemn.[4] The court of appeals formulated the issue as follows:

> [T]he issue presented is whether the "taking" which triggered the lawsuit was completed [before May 1986, when CSDH expressly was given the power of eminent domain], or is a continuing one which merely commenced when the regulations exceeded reasonable police power regulation and continues until such time as the regulations are removed or just compensation is paid and the title transfers.

The Mill, 787 P.2d at 179. The court of appeals reasoned:

> [O]nce government's restrictions on use are of such magnitude as to substantially impair the owner's use of the property, the date of the injury or taking cannot be determined without

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[4] Because the court of appeals held that the taking continued to occur through May 1986, when the parties agreed CSDH had the power of eminent domain, the court of appeals did not address the issue of whether CSDH was granted the power of eminent domain by the 1979 statute. *The Mill*, 787 P.2d at 179, 180.

> consideration of the essential factor of the regulation's duration.
>
> We believe the trial court, in concluding that the taking "occurred" prior to May, 1986, ignored this unique characteristic of regulations. . . .
>
> [W]here, as here, the regulatory restrictions are applied repeatedly and continually, the private injury and thus the "taking" continues to "occur" until such time as the regulations are removed or just compensation is paid.

The Mill, 787 P.2d at 180. The court of appeals then held:

> [B]ecause the "taking" which triggered the Mill's condemnation claim continues and the State possesses the right to condemn, the Mill has sufficiently alleged the legal basis and facts, which, if proven, would establish all of the elements of inverse condemnation.

The Mill, 787 P.2d at 180. The court of appeals erred both in its reasoning and in its holding.

Contrary to the court of appeals' analysis, the duration, continuity, or uniqueness of regulations cannot transform a regulatory taking claim into an inverse condemnation action. Just as physical takings are not continuous, the continued application and duration of regulations do not make regulatory takings "continuous" for the purpose of maintaining an action in inverse condemnation.[5] In both regulatory and physical takings, the

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[5] It is not contended that physical takings can be continuous. This position would be inconsistent with the holdings of *Monen v. State Dep't of Highways*, 33 Colo.App. 69, 71, 515 P.2d

taking "occurs" at a certain point and the unconstitutional taking continues to "occur" until the taking ceases or just compensation is paid. The measure of damages for the taking is the value of the use of the land during the taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987). Although it may be difficult to determine when a regulatory taking commences (especially when regulations are gradually and continually applied), regulatory takings like physical takings commence at a certain point. *See First English,* 482 U.S. at 321, 107 S.Ct. at 2389 (holding that compensation is required for temporary regulatory takings);[6] *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 485-502, 107 S.Ct. 1232, 1241-1251, 94 L.Ed.2d 472 (1987) (articulating and applying a test for whether a regulatory taking has occurred). Thus, there is no justification for holding that a regulatory taking is continuous for the purpose of maintaining an action in inverse condemnation.

Moreover, we disagree with the determination implicit in the court of appeals' holding that a party may sue a state entity in inverse condemnation so long as the state entity acquires the power of eminent domain while

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1246, 1247 (1973) (the right to damages accrues at the time of the taking), and *Seven Lakes Reservoir Co. v. Majors,* 69 Colo. 590, 598, 196 P. 334, 336 (1921) (statute of limitations in inverse condemnation begins to run when the taking occurs).

[6] The Court held that compensation was required for temporary physical takings long before the Court held that compensation was required for temporary regulatory takings. *See First English,* 482 U.S. at 318, 107 S.Ct. at 2387.

the taking is still occurring. We hold that for a litigant to be able to sue a state entity in inverse condemnation, the state entity must possess the power of eminent domain at the time of the taking. This rule is consistent with the previously established rules that the state entity must possess the power to condemn for a litigant to proceed in inverse condemnation, *see, e.g., Collopy*, 625 P.2d at 1005, that the right to damages for a taking accrues to a landowner at the time of the taking, *Monen v. State Dep't of Highways*, 33 Colo. App. 69, 71, 515 P.2d 1246, 1247 (1973), and that the statute of limitations in inverse condemnation actions begins to run when the taking occurs. *Seven Lakes Reservoir Co. v. Majors*, 69 Colo. 590, 598, 196 P.334, 336 (1921).

The trial court in this case found that the regulatory taking commenced in 1984, when O.C. Coal terminated its lease.[7] Given this finding and the fact that CSDH did not obtain the power to condemn until May 1986, The Mill's inverse condemnation claim must be dismissed.

III.

We also granted certiorari to determine whether the court of appeals erred in merging all claims and defenses into the inverse condemnation claim. If we hold that all claims are subsumed in the inverse condemnation claim,

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[7] The trial court specifically stated that "use deprivation became important" when O.C. Coal terminated the lease. This analysis coincides with the Supreme Court's test for a regulatory taking as the denial of "economically viable use" of the property. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485, 107 S.Ct. at 1241.

all of The Mill's claims will be dismissed along with its inverse condemnation claim. Thus, the issue is whether inverse condemnation is the exclusive remedy for a regulatory taking. We hold that The Mill is not limited to the remedy of inverse condemnation.

The United States Supreme Court has not specified a preferred or exclusive remedy for a regulatory taking. *See San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 660, 101 S.Ct. 1287, 1308, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting) ("[T]he [Takings Clause of the United States] Constitution does not embody any specific procedure or form of remedy that the States must adopt. . . . The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so."). *See also First English*, 482 U.S. at 319, 107 S.Ct. at 2388 (damages for a temporary regulatory taking are the value of the use of the land during the taking). The Court has analyzed whether a regulatory taking occurred under the same test regardless of whether the claim specifically was based on inverse condemnation or the claim merely alleged a "taking." *Compare Agins v. Tiburon*, 447 U.S. 255, 258, 100 S.Ct. 2138, 2140, 65 L.Ed.2d 106 (1980) (landowner sought damages specifically in inverse condemnation) *with Keystone Bituminous Coal Ass'n*, 480 U.S. at 479, 107 S.Ct. at 1238 (landowners alleged "a taking of their property in violation of the Fifth and Fourteenth Amendments"). However, "it has been established . . . that claims for just compensation are grounded in the Constitution itself. . . . [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482

U.S. at 315-16, 107 S.Ct. at 2385-86. *See also United States v. Clarke*, 445 U.S. at 257, 100 S.Ct. at 2140 (noting that the Court has authorized inverse condemnation actions based on "the self-executing character of the [Takings Clause of the United States Constitution] with respect to compensation. . . . ").

Under Colorado law, inverse condemnation is not the exclusive remedy for a taking. *Collopy v. Wildlife Comm'n*, 625 P.2d at 1005-06; *Ossman v. Mountain States Tel. and Tel. Co.*, 184 Colo. 360, 364, 520 P.2d 738, 741 (1974); *Game and Fish Comm'n*, 162 Colo. at 310, 426 P.2d at 566. In *Ossman*, we held that a landowner may elect whether to proceed in inverse condemnation or trespass where a trespasser refuses promptly to initiate eminent domain proceedings. *Ossman*, 184 Colo. at 364, 520 P.2d at 741. Moreover, in *Game and Fish Comm'n*, we held that because a property owner seeking to recover for damage to property caused by a state agency that had no power to condemn could not be held to have commenced an inverse condemnation action, the property owner was not limited to the measure of damages usually applicable in a condemnation case. *Game and Fish Comm'n*, 162 Colo. at 310, 426 P.2d at 566. *See also Collopy*, 625 P.2d at 1005-06 (a litigant who alleges a taking without just compensation by an agency that does not have the power of eminent domain is not limited to the remedy of inverse condemnation).

We decline to restrict the remedy for a taking to inverse condemnation where the potential consequence of such a holding would be that a property owner would have no remedy for a violation of the self-executing Takings Clauses of the United States and Colorado Constitutions. Limiting a property owner to an inverse condemnation

action against an agency that does not have the power to eminent domain would enable the State to take property without paying compensation, in violation of the United States and Colorado Constitutions.[8]

In addition, we note that there is a difference between a regulatory taking and a taking by eminent domain. Regulatory takings are difficult to define, *The Mill*, 787 P.2d at 180, and calculation of damages often may be difficult. Thus, even though claims for regulatory takings are grounded in the Takings Clauses of the United States and Colorado Constitutions, they need not

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[8] This apparently, was the concern that prompted the court of appeals to hold that the alleged taking in this case was continuous. The court of appeals warned that "the singular purpose of the [Taking Clauses] would be severely diminished were we to conclude, as did the trial court, that the taking alleged by The Mill was limited to a specific date which occurred prior to the May 16, 1986 amendment which expressly authorized the State's power of eminent domain." *The Mill*, 787 P.2d at 180.

We agree with the court of appeals that a property owner cannot be denied a remedy for an unconstitutional taking by an agency that did not have the power of eminent domain. *See, e.g., Collopy*, 625 P.2d at 1005 ("To compel [a litigant] to proceed in inverse condemnation [against an agency that lacks the power of eminent domain] . . . would enable [the agency] to acquire indirectly property rights the legislature has denied it the power to acquire by direct condemnation."); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d at 1044 ("If a private party were unable to seek redress under the just compensation clause when an official agency acts outside its statutory powers and takes property for public use, the state would be able to escape liability under the just compensation clause by taking property through agencies without statutory powers of eminent domain.").

be treated as eminent domain proceedings under section 38-1-101 to -122, 16A C.R.S. (1982 & 1990 Supp.). *Cf. Ossman,* 184 Colo. at 366, 520 P.2d at 742; *Game and Fish Comm'n,* 162 Colo. at 309, 426 P.2d at 566; *Stuart v. Colorado E. R.R. Co.,* 61 Colo. 58, 70, 156 P. 152, 156 (1916).

For these reasons, we conclude that The Mill's claims for regulatory taking and promissory estoppel, along with the State's defenses to those claims, are not subsumed in the inverse condemnation action. We therefore remand this case to the court of appeals for resolution of The Mill's remaining claims and the State's defenses to those claims.[9]

Judgment reversed and case remanded to the court of appeals for further proceedings consistent with this opinion.

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[9] As discussed above, *supra,* pp. 436-437, since this case was tried, CSDH initiated a condemnation action on The Mill's property. The trial court in this case, however, awarded damages on the assumption that CSDH would clean The Mill's property and return it to The Mill in a cleaned and unrestricted state. Thus, if the court of appeals determines that a regulatory taking has taken place, it also must be determined whether the award of damages to The Mill for the temporary regulatory taking must be revised in light of the condemnation proceeding.

APPENDIX E

THE MILL, Plaintiff-Appellant and Cross-Appellee,

v.

STATE of Colorado, DEPARTMENT OF HEALTH, Defendant-Appellee and Cross-Appellant.

Nos. 87CA0502, 87CA0838.

Colorado Court of Appeals, Div. II.

Aug. 17, 1989.

Rehearing Denied Sept. 21, 1989.

Certiorari Granted Feb. 12, 1990.

Owner of former uranium processing site filed complaint alleging inverse condemnation, and a regulatory taking. The District Court of the City and County of Denver, H. Jeffrey Bayless, J., entered judgment awarding plaintiff $200,000 as damages for temporary regulatory taking, but dismissed claim for inverse condemnation. Plaintiff and defendant appealed. The Court of Appeals, Smith, J., held that plaintiff could assert inverse condemnation claim, even though its complaint was filed several months before the State was expressly granted the power of eminent domain in uranium processing site cases, considering that regulatory restrictions were such that the "taking" continued to occur.

Reversed and remanded with directions.

Holley, Albertson & Polk, P.C., George Alan Holley and Eric E. Torgersen, Golden, for plaintiff-appellant and cross-appellee.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., and Jerry W. Goad, First Asst. Atty. Gen., Denver, for defendant-appellee and cross-appellant.

Opinion by Judge SMITH.

The plaintiff, (the Mill) appeals the trial court's order dismissing its claim in inverse condemnation against the Department of Health (the State). Both parties appeal from a judgment entered by the trial court which awarded the Mill $200,000 as damages for what the court, in essence, determined to be a temporary regulatory "taking." Both appeals have been consolidated. We reverse the order of the trial court dismissing the Mill's claim in inverse condemnation and vacate the judgment entered on the Mill's remaining claims.

The Mill is the owner of a sixty-one acre parcel of property which is essentially divided into two parts: The mill yard (25 acres), which is the parcel of major concern here, and the tailings pile (35 acres). The property operated as a uranium and uranium mill tailings disposal site in the late 1950s and until 1962. This activity left the property and the buildings and equipment located on the property contaminated with radioactive material.

Milling operations were originally conducted pursuant to a license issued by the Atomic Energy Commission (AEC) which, after milling operations ceased, was reissued to permit only the storage on the property of

past mill tailing products and contaminated equipment and buildings. The permit was again amended in 1968 to allow the transfer of decontaminated equipment. Also in 1968, the State was delegated authority by the AEC to regulate radioactive materials formerly under the jurisdiction of the AEC and the State thus obtained regulatory jurisdiction over the property and the license.

In 1971, after the then-owner of the property completed a decontamination process of the mill yard equipment and building, the State terminated the license and the mill yard was thus authorized for unrestricted use.

In 1973, the Mill reviewed the State's records and discovered the information regarding the 1971 decontamination and license termination. Relying on such information, and believing the mill yard parcel was safe and its use unrestricted, the Mill purchased the entire property.

In 1978, due to the growing awareness of the potential hazards presented by uranium mill tailings, Congress passed the Uranium Mill Tailings Radiation Control Act (UMTRCA) 42 U.S.C. §§ 7901 to 7942 (1978). The purpose of the act was to decontaminate specific uranium processing sites in order to protect the public health from the hazards of uranium contamination. All 61 acres acquired by the Mill were designated under UMTRCA as a "Processing Site," eligible for remedial action under that act and in 1981, the Mill and the Department of Energy (DOE) entered into a limited agreement, permitting DOE to test the tailings pile. However, testing was ultimately performed on all 61 acres and contamination of the mill yard was confirmed in 1982.

In 1983, the Mill leased the entire 61 acres to O.C. Coal Company, primarily for the storage of coal, at a rental of $7,000 per month. The Mill subsequently notified the State of the lease and in response, the State began issuing the Mill a series of restrictive letters and communications. These restrictions included: limiting use of the Mill building to only those portions covered by concrete pads; otherwise limiting use until certain improvements had been made by the Mill; prohibiting any storage of coal without express authorization of the State; and restricting the Mill from use of any portion of the mill yard outside the building to a 50 foot strip along the edge of the property.

These restrictions directly impacted the Mill's lease with the coal company which consequently terminated the lease in 1984. Since then, the Mill has earned only approximately $500 to $700 a month from the mill yard based upon 20% building use.

Alleging that based on the state's restrictions, the property could not be put to any reasonable economic use, the Mill filed a complaint in January of 1986 alleging three claims for relief: Inverse condemnation; a regulatory taking; and estoppel of the State to deny them use of their property. The State filed its answer in April, and in June, filed a motion to require an election of remedies. In response to the motion for election of remedies, the trial court ordered briefs on the State's authority to condemn. Thereafter, in February 1987, the trial court dismissed the Mill's claim in inverse condemnation.

A trial was subsequently held on the Mill's remaining claims and the trial court ruled that the State had so

diminished Mill's right to use its property as to constitute a "regulatory" taking of the Mill's property. Measuring damages in terms of "loss of use" over a several-year period, the trial court awarded the Mill $200,000.

I.

The Mill initially contends that the trial court erred in dismissing its claim in inverse condemnation. We agree.

The Mill argues that the trial court improperly concluded that the government activity on which the claim of inverse condemnation was based "occurred" prior to May 16, 1986, the date on which, by legislation, the State was expressly granted the power of eminent domain in such cases.

When reviewing the propriety of a dismissal on the pleadings, we must consider the allegations in the Mill's complaint as true. *Abts v. Board of Education*, 622 P.2d 518 (Colo.1980).

The Mill has alleged in support of its claim in inverse condemnation that, in 1971, the department delicensed the property, thus sanctioning its unrestricted use and that, the Mill relied on the property's delicensed status when it purchased the property in 1973. The Mill further alleges that upon notifying the State that the property had been leased to O.C. Coal Company for retail coal sales operations, the State imposed numerous restrictions and conditions upon the lessee's use of the property so that the property could not be used as originally intended under the lease. They also allege that the State's restrictions effectively preclude *any* viable economic use of the

property. Finally, the Mill alleges that under the UMTRCA program, the State has the power of eminent domain and that the State has, in effect, taken possession of, or condemned, the property without having paid the Mill just compensation.

In order to proceed in inverse condemnation, that is, to compel the State to exercise its power of eminent domain, the plaintiff must establish that: (1) There has been a taking or damaging of the property (2) for a public purpose without just compensation, (3) by a governmental or public entity which has the power of eminent domain but which has refused to exercise it. *Jorgenson v. City of Aurora*, 767 P.2d 756 (Colo.App.1988). *See also Kratzenstein v. Board of County Commissioners*, 674 P.2d 1009 (Colo.App.1983).

Here, the trial court, after rejecting the Mill's contention that the taking alleged was a continuous and reoccurring event, determined that at the time the taking occurred, the State lacked the power of eminent domain and thus, the claim of inverse condemnation must fail as a matter of law.

In it well settled in Colorado that there can be no inverse condemnation in a situation where no right exists in a government agency to proceed under eminent domain. *Game and Fish Commission v. Farmers' Irrigation Company*, 162 Colo. 301, 426 P.2d 562 (1967). Moreover, because the power of eminent domain is vested in the State, the delegation of such authority to a subdivision of the State must be clearly expressed through legislation. *Board of County Commissioners v. Intermountain Rural Electric Association*, 655 P.2d 831 (Colo.1983).

The State's participation in UMTRCA is expressly authorized pursuant to § 25-11-303(1), C.R.S. (1988 Cum.Supp.). Subsection (1)(d) of this section specifically governs the manner in which the State may acquire property which has been designated by the federal act for cleanup.

In 1979, the General Assembly authorized the Department to "acquire and dispose" of designated processing sites. Moreover, in May 1986, this statutory provision was expanded specifically to authorize the Department to acquire such property by condemnation in accordance with the provisions of § 38-1-101, et seq., C.R.S. (1982 Repl.Vol. 16A) and § 24-56-117, C.R.S. (1988 Repl.Vol. 10B).

Because it is undisputed here that after May 16, 1986, the State clearly possessed the right to condemn and, that the Mill's complaint preceded this date, the issue presented is whether the "taking" which triggered the lawsuit was completed on that date, or is a continuing one which merely commenced when the regulations exceeded reasonable police power regulation and continues until such time as the regulations are removed or just compensation is paid and the title transfers.

"A 'taking' is constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." Michelman, *Property Utility and Fairness Commentaries on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, (1967).

Unlike a taking based on a physical appropriation, where the injury and the date the injury was incurred are

relatively easy to identify, a regulatory taking under an exercise of the State's police power is more difficult to define. *See Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). *See also Board of County Commissioners v. Flickinger,* 687 P.2d 975 (Colo.1984). ("What constitutes a taking has proved to be a problem of considerable difficulty. . . . There is no set formula for determining when justice and fairness require economic injuries caused by public action be compensated by the government. . . . ")

Nonetheless, the nature of regulatory restriction and the purpose of the just compensation clause of U.S. Const.Amend. V and Colo. Const. art. II § 15 guide our analysis of this issue.

Regulations are, by their very nature, three dimensional: they have depth, width, and length. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304, 322, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250, 268 (1987) (holding that "temporary takings" are compensable). Thus, a regulation's prohibitory or confiscatory effect is a reflection of not only the severity and scope of the government's regulation on use, but also the repetitive and prolonged restriction on use which is embodied in the regulatory scheme.

Consequently, once government's restrictions on use are of such magnitude as to substantially impair the owner's use of the property, the date of the injury or taking cannot be determined without consideration of the essential factor of the regulation's duration.

We believe the trial court, in concluding that the taking "occurred" prior to May, 1986, ignored this unique

characteristic of regulations. To date, the Mill's property remains contaminated and the restrictions on use due to the contamination allegedly continue to preclude all viable economic use of the property. Thus, quite clearly, there exists today the same injury, the same taking, which was alleged in the Mill's complaint in January, 1986.

Consequently, we hold that where, as here, the regulatory restrictions are applied repeatedly and continually, the private injury and thus the "taking" continues to "occur" until such time as the regulations are removed or just compensation is paid.

We believe this interpretation is consistent with the constitutional guarantee on which an action in inverse condemnation is based. *See* U.S. Const.Amend. V and Colo. Const. art. II, § 15. The purpose of these provisions is not to preclude the government's interference with property rights but to secure *compensation* in the event of otherwise proper interference amounting to a "taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, supra.*

Where, as here, the State obtained the express power of eminent domain within a few months of the time the Mill filed its complaint and long before the case came to trial, the singular purpose of the constitutional provisions would be severely diminished were we to conclude, as did the trial court, that the taking alleged by the Mill was limited to a specific date which occurred prior to the May 16, 1986 amendment which expressly authorized the State's power of eminent domain.

Accordingly, we conclude that because the "taking" which triggered the Mill's condemnation claim continues

and the State possesses the right to condemn, the Mill has sufficiently alleged the legal basis and facts, which, if proven, would establish all of the elements of inverse condemnation. Therefore, the trial court erred in not allowing the Mill to either present its claim of inverse condemnation or, in not allowing the Mill leave to amend its complaint to specifically allege a continuing taking beyond May 16, 1986.

II.

Based on our disposition of the Mill's appeal of the trial court's order dismissing its claim in inverse condemnation, we decline to address the Mill's remaining issues on appeal or the issues raised by the State in its cross-appeal as these relate to the alternative claims that resulted in the compensatory judgment entered by the trial court.

The State, however, has raised certain defenses which it alleges, as a matter of law, preclude the Mill's right to bring this action.

Inverse condemnation actions, grounded in Colo. Const. art. II, § 15, are to be treated as eminent domain proceedings. *Jorgenson v. City of Aurora, supra,* and are subject to § 24-56-116, C.R.S. (1988 Repl.Vol. 10B). Neither exhaustion of administrative remedies or notice of claims are conditions precedent to maintaining an action under § 38-1-101, et seq., C.R.S. (1982 Repl.Vol 16A). Similarly, Colo. Const. art. II § 15 creates an exception to the State's sovereign immunity from liability for damages. *See Board of County Commissioners v. Atler,* 69 Colo. 290, 194 P. 621

(1920). Thus, these defenses are not available to the State in relation to the inverse condemnation claim.

The order dismissing the Mill's claim for relief in inverse condemnation is reversed and the cause is remanded with directions to the trial court to reinstate that claim and for further proceedings thereon. In light of this holding, the judgment previously entered on the Mill's other claims is vacated since the issues involved therein, such as damages as a result of excessive regulation and estoppel, are subsumed in the inverse condemnation claim.

PLANK and HUME, JJ., concur.

APPENDIX F

DISTRICT COURT, GUNNISON COUNTY, COLORADO

CASE NO. 89CV116

RULE AND ORDER

DEPARTMENT OF HEALTH, STATE OF COLORADO,

Petitioner,

v.

THE MILL, a limited partnership; and
GUNNISON COUNTY TREASURER,

Respondents.

THIS MATTER comes before the court upon Petitioner's Motion for a Rule and Order Vesting Title in Petitioner with respect to the acquisition of the property which is the subject matter of this action. Upon considering the motion and briefs and other pleadings:

THE COURT FINDS: That it has full and complete jurisdiction of the subject matter of this action and the parties thereto; that service has been made upon all interested parties as required by law; that respondent The Mill is the owner of record of the property; that the parties have agreed that the property has a fair market value of zero; and that the petitioner has lawfully taken the property pursuant to the statutes and Constitution of the State of Colorado.

IT IS ORDERED, ADJUDGED, and DECREED that the property described in Exhibit "A," attached hereto

and incorporated herein by reference, has been duly and lawfully taken by the petitioner pursuant to the statutes and Constitution of the State of Colorado; that the interests of the respondent in said land has been acquired by the petitioner, and that the title to said property, together with all appurtenances thereunto belonging, is hereby vested in the petitioner; and, it is

FURTHER ORDERED that a certified copy of this Rule and Order be recorded and indexed in the office of the clerk and recorder of Gunnison County, in like manner and with like effect as if it were a deed of conveyance from the owner and parties interested to the petitioner herein.

DATED April 9, 1991.

BY THE COURT

/s/ Thomas J. Goldsmith
DISTRICT JUDGE

APPENDIX G

DISTRICT COURT, COUNTY OF DENVER,
STATE OF COLORADO

Case No. 86 CV 3945, Courtroom 20

REPORTER'S TRANSCRIPT

THE MILL, a limited partnership,

Plaintiff,

v.

STATE OF COLORADO, DEPARTMENT OF HEALTH,

Defendant.

The hearing in this matter commenced on Tuesday, April 21, 1987, before the HONORABLE H. JEFFREY BAYLESS, Judge of the District Court.

This transcript contains the Court's ruling.

FOR THE PLAINTIFF: Mr. James H. Foster.
Mr. George A. Holley.

FOR THE DEFENDANT: Mr. Lawrence DeClaire.

[p. 2] (The following proceedings were had and entered of record:)

THE CLERK: Calling Case No. 86 CV 3945 The Mill versus State of Colorado.

I recognize Mr. Holley and Mr. Foster. Would counsel for the State enter their appearance, please.

MR. DeCLAIRE: Your Honor, my name is Lawrence DeClaire. I'm from the Natural Resources section of the Attorney General's office. Mr. Neblett is in trial in Durango this week and was unable to attend. He asked me to appear on behalf of the State to receive the Court's ruling.

THE COURT: Thank you.

This trial was held to the Court and concluded approximately three weeks ago yesterday. Subsequent to the trial, the Court has spent a very good deal of time doing a number of things. Included in those things were reviewing all of the exhibits which were admitted, reviewing case law which was submitted by both sides, and doing further analysis of that case law. In addition, I have reviewed several cases which have not been urged by either side, and have just spent a good deal of time trying to analyze this case.

I find it to be unique. I find no case that I have read that has all of the factors, in the combination that this case does. Specifically, I'm making reference to the fact of what, in essence, is a national statement of [p. 3] public policy of the need to clean up areas such as the Gunnison uranium mill site, that being the Uranium Mill Tailings Remedial Action Act that everybody talked about as UMTRA. I've not found a case that has that as an overriding concern.

In addition to that, the delay that has been occasioned in that program, since it was enacted in '78, since this particular site was designated in '79, and we are '87, and although there has been some preliminary work done, the fact that nothing has actually been set in motion

to clean up this site has caused the Court a good deal of concern, as well. So, for those reasons, I have taken a little extra time than I anticipated in preparation for the ruling.

This is the ruling of the Court: This case involves a fascinating and unique set of facts which must be integrated into a body of law, which has not, to date, dealt with radiation issues in this state, nor in other states that the Court can find. The facts deal with what was described during the trial as a regulatory framework which has evolved over time to deal with our increase in knowledge of radiation and its dangers.

Testimony indicated that in 1971, when the property in question was removed from licensure, that the Atomic Energy Commission didn't even consider it important [p. 4] enough to regulate the tailings pile, let alone the mill yard. Today, on the other hand, according to testimony which was introduced at this trial, radiation is considered potentially harmful in any degree. That comes from the testimony of Mr. Gonzales – excuse me, Dr. Gonzales. Dr. Gonzales testified there is no safe level of radiation.

The site in question is approximately 61 acres in size, adjacent to the Gunnison airport, known as The Mill property. It was a uranium mill in the 1940's and 1950's. And it was suggested to the Court, during the testimony, that uranium from this mill was used in the Manhatten [sic] Project in World War II, which developed the first atomic weapon. That's from the testimony of Mr. Ferraro. The property ceased being a uranium mill, and a type, a version, if you will, of cleanup was commenced.

The property was roughly divided into two parts; the first being what was referred to in the trial as a "tailings pile," and that tailings pile occupied approximately 35.4 acres of the total 61 acres. The second part is what is now being referred to as the "mill yard," occupying approximately 25 acres. The Court is not going to consider or concern itself at all with the tailings pile, because that really isn't what this lawsuit is all about. This case relates entirely to the 25 acres in the mill yard.

Uranium mill sites had to have licenses while [p. 5] they were operating, to conduct their business, to give certain guidelines as to how to conduct it, for safety sake. But after the cleanup efforts in 1970, culminating in 1971, Colorado Ventures, which was the previous owner of this property, was assured that it could sell the mill yard site, the 25 acres, without licensure. That comes from Plaintiff's Exhibit 3. And in fact, State Department of Health terminated the license for the 25 acre mill site July 7, 1971. That is Plaintiff's Exhibit 1.

The testimony of Dr. Hersloff indicated that in 1971, such cleanup efforts as were done related to buildings and equipment, with an emphasis at that time on alpha contamination. Dr. Hersloff explained that alpha contamination is a type of particle contamination; the particles having low speed and a very limited range. She further indicated that since 1971, concerns have grown for other types of radiation contamination, including, in her terms, radon contamination, radon progeny called radon daughters, and gamma radiation.

She indicated that although there were proper tools and equipment for testing for these types of other radiation problems in 1971, there was not a sufficient concern at that time for the dangers from these other radiation hazards. Perhaps that was based upon a lack of knowledge. Anyway, in any event, they were not part of the [p. 6] exam that was done prior to the delicensure in 1971.

After The Mill property had been released from licensure, as being decontaminated to the standard of the day, in 1971, the Plaintiff Mill Partnership purchased the entire 61 acres in July 1973. Now, this was done after a review of the Colorado State Department of Health files, because the testimony was, and this comes from Mr. Bishop, that the partnership was concerned about the fact that the property had been a uranium mill, and about the remaining tailings pile.

Mr. Bishop testified to his review of the Colorado State Department of Health files, in February of 1973. And from that review, Mr. Bishop testified that he learned the mill yard, the 25 acres that the Court is talking about, had no restrictions on it, from the Department of Health, but that the tailings pile did have restrictions. He testified, as did one of his partners, Mr. Decker, that the partnership relied upon the decontamination and license termination information in the Department of Health files, in making their decision to purchase this particular piece of property.

The purchase was a speculative venture on the part of The Mill partnership, in that while it had a good location, adjacent to the Gunnison airport, there were no construction or other improvement plans for the site

when it [p. 7] was purchased by the Plaintiff. The testimony from Mr. Decker bolstered this testimony from Mr. Bishop. Mr. Decker's phrase was that the property had appreciation potential.

From the time of the purchase in 1973, to 1978, this property was used for storage, as a storage warehouse, only. During the period of 1973, through 1978, there were certain dealings between the Plaintiff Mill and the Colorado State Department of Health. These are highlighted by a number of Plaintiff's exhibits, including Plaintiff's Exhibit 6.

The Colorado State Department of Health continued to monitor the tailings pile, but that monitoring of just the tailings pile began, during this time period, '73 to '78, to lap over onto the mill site, as well. Now, why this was done is certainly not clear. There was testimony from Mr. Hazle that at sometimes there was a misunderstanding as to whether the land was licensed or was not, or at least there was a misusage of terminology that was appropriate in the Department of Health under their regulations. What is clear is that while this was being done as to the mill site itself, the mill yard, there was no objection from the Plaintiff partnership. And the evidence shows an ongoing cooperation in allowing not only the inspections, but also in attempting to comply with the requests of the Department of Health.

[p. 8] There is reference through the testimony of Mr. Gamewell to a 1976 memo, and I say "reference" because that memo was never received in evidence. And I'm not certain it's ever been located. Mr. Gamewell testified, however, and Plaintiff's Exhibit 36 indicates that that

memo did exist, that in 1976, he was a member of the Department of Health, indicated the mill site should have been relicensed. Now, oh, one other thing, Mr. Gamewell also indicated that all of the other UMTRA, the federal sites, are under license; that this is the only one which is not.

Now, 1978 is a watershed year, because it was during that year that the federal government passed the Uranium Mill Tailing Radiation – whatever – the UMTRA Act, and I have it here somewhere. That Act is Defendant's Exhibit B, and that Act recognized the potential hazards caused by radiation at active and inactive uranium mill sites. That Act has, as its goal, the cleanup of these particular sites. And included in that Act, in 1978, was a listing of the proposed properties to be cleaned up, and the Gunnison mill site is indeed in that legislation, 1978. Nine of the 22 sites listed in that legislation were in Colorado.

The year following, and specifically, in December of 1979, the Plaintiff was advised of the specific designation of the Gunnison site as a, and I quote, "candidate for remedial action," end of quote. That's from [p. 9] Defendant's Exhibit C. While the priority in Defendant's Exhibit C for the cleanup of this particular property was listed as, once again, I quote, "high," this designation was not, by its own terms, an assurance or guarantee of remedial action.

Under this Act, in 1981, the Plaintiff entered into a use agreement with the Department of Energy for testing. Now, the use agreement, which is Plaintiff's Exhibit 31,

was limited, however, and it was limited by its own terms to the tailings pile.

In February, of 1983, the Plaintiff leased the mill property to O.C. Coal, and notified the Department of Health of this lease. Now, it is not clear to the Court that they had to give this notification, under any regulations that they were compelled to operate under, because as of 1983, the mill site was still without a license. But in any case, they did notify the Department of Health.

In response to this notice, the Colorado State Department of Health began a series of acts, which taken together, really form the basis for this lawsuit. Although the 25 acres had been declared free of contamination and of control, the Colorado State Department of Health's letter of March 4, 1983, starts talking about the "existing mill yard radioactive contamination." That's a quote.

Now, in 1971, it was released from licensure as [p. 10] though there were no remaining contamination. And yet, one month after the lease, we start hearing – the Court starts hearing language about existing mill yard radioactive contamination. Plaintiff's Exhibit 11, that's where this language comes from, is a remarkable exhibit. While it sounds like a regulation and a restriction, the Defendant, State of Colorado, Department of Health says that it's not a regulation, and it's not a restriction, because the terms used were "should" rather than "shall" or "must" as to what should be done with the mill yard.

Further communications from the Department of Health continue this pattern of restriction. The letters indicate, and I am making reference to a number of Plaintiff's Exhibits, Plaintiff's 13, 14, 16, 17, and 42, in

particular, these letters indicate that the mill property is licensed, and that's not true. The only part of the area that, at that time, was licensed was the tailings pile. Now, these letters directly impacted the coal lease with O.C. Coal. As a matter of fact, one of the exhibits points out that there's only a 50-foot strip of land that is free of contamination and properly acceptable for coal storage, according to the Department of Health

Finally, 1985, the Plaintiff just flatly asked, "What can we do with our property," because they were unclear, based upon this series of communications. The [p. 11] answer given by the Department of Health in that time to that was not perfectly clear and easily understood by the Plaintiff.

Let me talk a little bit about cleanup proposals. The evolution of the cleanup proposals for this particular piece of property, as well as other active and inactive uranium mill sites, I have already indicated began in 1978 with the passage of the Federal Act. With regard to the Gunnison mill property, the UMTRA program suggests that the cleanup will be of the whole site, not just the tailings pile, as was initially thought, and was initially reconfirmed to the Plaintiff through the use agreement, because the mill yard itself has now been found to be contaminated.

Several exhibits were admitted, and the exhibits are in the form of overlays on a diagram of the entire 61 acres. And those overlays contained sites on the property where radiation readings were taken, both at ground level and waist high level. And those readings show, under the Court's interpretation and understanding of

the testimony of the expert witnesses, that the entire mill yard is indeed contaminated to such a point that it is not safe for general public access, and that it needs to be cleaned up.

The testimony that was most persuasive to the Court in this regard is from Dr. Gonzales, who said there's just no known safe level of radiation. All radiation is [p. 12] potentially harmful. Now, it is not clear to the Court how the federal UMTRA program will work. There have been meetings, there have been proposals for cleaning up the Gunnison mill site. The proposal that was favored by the federal authorities was a stablization [sic] in place on the site, but that now, from the testimony the Court heard, has apparently been ruled out, and a second plan to move the material off the site has now been adopted. And what remains to be determined is the location, as to where that contaminated property will be moved, how it will be enclosed, those sorts of things.

Now, if the federal program was to stabilize the hazardous contaminated material on site, according to the statute, the federal government and the state, on a 90/10 payment basis, would have to purchase the property. However, when the property is to be cleaned up and then returned to its owner in a decontaminated state, as I understand the legislation, the federal government and state may purchase it, and that might come to pass, or they don't have to, they can just clean it up and return it to the owner. That's from the testimony of Mr. Ferraro. What will be done, whether they will purchase this or not, once again, has not yet been determined.

Certain facts, I think, have been proven beyond dispute. First of all, the property was not purchased from [p. 13] the State of Colorado. Secondly, the property was purchased, in part, on reliance on Colorado State Department of Health records, showing no contamination on the 25 acre mill site. Third, the Plaintiff knew what had been there, knew there had been a uranium mill on that site; and knew what was still there; that is to say, the tailings pile. The Plaintiff did not know, at the time that it purchased, that there was radioactive contamination on the mill site itself.

Fourth, the actions taken by the federal government under the UMTRA Act, reveal that the entire 61 acres are hazardous under its standards; not just the tailings pile. So, that includes the mill yard. Fifth, it's also been proven, to the satisfaction of this Court, that the federal program, the UMTRA Act, will clean this up at no cost to the Plaintiff, either by purchasing the property or by cleaning it and returning it to him in a decontaminated state. Six, if it's returned to the Plaintiff in a decontaminated state, since all 61 acres will be cleaned up, there may be something in the nature of a winfall [sic] to the Plaintiff, because, as opposed to when the Plaintiff purchased this, it had 25 acres of useable land, it now will have 61 acres, a net boost of 35 plus acres.

The questions that this Court has to answer, I believe, are twofold. First of all, have the restrictions on the use of the mill site by the Colorado State Department of [p. 14] Health amounted to a compensable taking under Article 2 Section 15, of the Colorado Constitution; and secondly, if this is true, and there has been a compensable taking,

what standard is to apply to measure the Plaintiff's damages for this taking?

I'm going to make reference to a lot of cases now. The Court finds the language in the case of *Board of County Commissioners versus Flickinger*, 687 P.2d 975, 1984, Colorado Supreme Court case, to be particularly instructive as a starting point for the legal analysis. At page 983, the court says: "Although the concept of a taking may originally have contemplated only physical appropriation, it is clear today that nonacquisitive governmental action may constitute a taking when the governmental activity substantially impairs an owner's use of the property. Unfortunately, however, the questions of what constitutes a taking has proved to be a problem of considerable difficulty. While the constitutional prohibition against governmental taking without just compensation is designed to bar the state from forcing some people alone to bear public burdens that, in fairness and justice, should be borne by the public as a whole, courts have simply been unable to develop any, quote, 'set formula' unquote, for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately [p. 15] concentrated on a few persons." That cites to the 1922 U.S. Supreme Court case involving Pennsylvania Coal.

The Court concludes that based upon the facts that I have outlined, and the law that is in existence at this time in the State of Colorado, that there has been in this case a nonacquisitive governmental taking by the State of Colorado through the Department of Health. There has been a

police power taking and deprivation of the use by the Plaintiff.

Now, there are a number of standards, then, that the Court has to look at in making this sort of determination, and in making the next determination as to what is the standard to measure the harm. The first deals with two cases which come from U.S. Supreme Court. And both of those cases indicate that the exercise of police power can amount to a compensable taking. The first, and I'm going to make specific reference, is *Goldblatt versus Town of Hempstead*, 369 U.S. 590 from 1962. In that case, which was – which dealt with a city ordinance regulating dredging and pit excavating, the Court said, "The power which States have of prohibiting such use" – and "such use" meant purposes that are declared by valid legislation to be injurious to the health – "by individuals of their property as will be prejudicial to the health, morals, or safety of the public is not, and consistently with the existence and safety of [p. 16] organized society, cannot be burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

The Court went onto [sic] say, "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." And once again, they finish with, "there is no set formula to determine where regulation ends and taking begins."

I cite this case for this reason: In that case, it was determined that the dredging and pit excavating within the city was a noxious use, and that's the key word from this case. That is contrasted in this case, that by the facts that Plaintiff isn't putting its property to any noxious use at all. It's merely using it to act as a storage facility. Plaintiff isn't affirmatively engaging any act that makes the property itself dangerous. The property is dangerous because it is contaminated with radiation.

The next case is also a U.S. Supreme Court case *Agins versus Tiburon*, 347 U.S. 254. That was a zoning dispute in a suburb of San Francisco, one of the more fashionable suburbs. In that case, the U.S. Supreme Court indicated, and I quote again, "The determination that [p. 17] governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interest."

I think I've got to do that, weigh the private interest of the Plaintiff Mill versus the public interest. The Court views the public interest as having been legislatively declared by the Federal Act, which says the country, as a whole, and the states in which these uranium mill sites are located, have committed to clean them up, and the public interest, I think, outweighs the private interest in this case. Especially, in light of the fact that the private interest didn't cause any of the problem, the radiation problem.

The Court finds that in Colorado, the test that the Court has to apply in this very circumstance is the test of reasonableness. I cite *Combined Communications versus Denver,* found at 542 P.2d 79, 1975 case. In that case, the Colorado Supreme Court was dealing with city ordinances which were prohibiting the erection of outdoor advertising, but this language from that case is instructive: "Although we agree that, under its police power, there are situations in which a government may deprive the owner of a certain use of [p. 18] property and not be in violation of the Fifth Amendment prohibition against taking private property without just compensation," citing *Pennsylvania Coal versus Mahon,* 260 U.S. 393, "nevertheless, there must be a recognition that that exercise of the police power can only be valid under – and only under – a standard of reasonableness. Therefore, whether one proceeds under a police power argument or under a regulatory argument, one proceeds down the same path – that of reasonableness." So, the Court has to determine what is reasonable, when the hazard isn't pit excavating, the hazard, instead, is potential injury, disease, or death due to radiation contamination.

There have been three cases in Colorado which have dealt with this issue and have talked about something which was self-inflicted harm. The three cases are – well, I will just go through them one-by-one. The first one is *Nopro versus Cherry Hills Village,* found at 504 P.2d 344. That was a zoning case. In that case, the Colorado Supreme Court said, "Nopro's land investment was made in full knowledge of the zoning limitations. It took the calculated risk that it could break the zoning use barrier and thereby double the profit from its investment." The

Court concluded, "If hardship exists, it was incurred voluntarily by the choice of Nopro and was self-inflicted."

The next case is *Ford Leasing versus Board of* [p. 19] *County Commissioners*, 528 P.2d 237, 1974. The Colorado Supreme Court at page 241 cites these words: "We note if there is hardship here it is self-inflicted. The application had been denied by the board when Ford *thereafter* purchased the property and took up the burden of appeal through the courts. Thus it had full and complete notice and knowledge."

Finally, the *Gold Run* case, found at 554 P.2d 317. The Colorado Supreme Court, once again, said, "Here, Gold Run purchased the property, having full knowledge of the existing restrictive zoning, with the intention of securing rezoning commensurate with Gold Run's own conception of proper development. If this is viewed as hardship, it was self-inflicted."

Now, I have cited these three cases because we have the opposite situation here. Plaintiff was aware that this was an old uranium mill site. And if Plaintiff had simply purchased, without examining the licensure or restrictions that were on the entire property, these cases might very well apply, saying it's self-inflicted. But the evidence in this case was that with that knowledge, that it had been a uranium mill, Plaintiff undertook an examination of all known records, including and with particular reference to the records which were in the State Department of Health files, thinking that that department would know as much as anyone about the status of this land. And what it found, [p. 20] quite reasonably so, was that there

were restrictions on the tailings pile. There were no restrictions on the mill site. So, unlike – it went in with full knowledge and notice, after a careful review, and it did not want to go in, purchase the property, and then get it changed for the use. It wanted to purchase the property free of restrictions, and use it free of restrictions.

So, the Court finds that this is not self-inflicted harm. There are two more cases both from Colorado that I think speak in this area. The first is the *Hermanson* case, which was cited by, I think, both sides during the trial, 595 P.2d 694. And I think it's particularly applicable. In that case, the Court said, "Whether the series of regulations, in toto, constitute a valid exercise of the police power or are tantamount to a taking is a question of degree, which requires an evidentiary determination. The motivation behind an ascertainment and evaluation of the public purpose sought to be served by the regulatory scheme likewise involves determination of factual questions, which if resolved in Plaintiff's favor would entitle him to appropriate relief."

Two or three parts of this are important. The *Hermanson* case talks of a series of regulations which taken, in toto, might add up to a taking, which could be compensable. And even though the language of the several [p. 21] letters that were introduced in evidence, many of which I have made reference to here today, might not, in and of themselves, be viewed, one or singly, as a taking. I think the Court can look at the total, based on the *Hermanson* language, and say what was the total effect on the property. And then, if the total comes out to something which amounts to a taking, based upon factual determinations,

then there can be an entitlement to appropriate relief; that is to say, damages.

The last Colorado case that speaks in this area is the *Collopy* case, which is 625 P.2d 994. At page 1001 of that opinion, the Colorado Supreme Court states as follows: "There is a limit to the extent to which a state may restrict the use of property or damage property under the police power. What amounts to a deprivation of property without due process of law is often difficult to determine, and the determination largely depends upon the nature of the particular case;" citing the *Ford Leasing* case. On the same page, further down, the Court indicates there are two methods for establishing that a land use regulation is an unconstitutional taking, and the second method is to show that it precludes the use of property for any reasonable purpose.

That case dealt with the taking of a particular square mile area around a lake for hunting purposes, but I [p. 22] think the language is appropriate. All these cases say the nature of the particular case, and as I started off today, this case is unique. The Court concludes, because of the unique nature of this case, because of the radiation hazard, because it was purchased with knowledge that there was no radiation, based on the current or existing knowledge in 1971, this Court concludes that there has been a taking which requires compensation. It concludes that the public should bear this cost. It should not fall disproportionately on the Plaintiff.

I find this to be a police power case, which amounts to a taking. I do not find that this is an estoppel case; although, there is an element of estoppel here, because of

the – I won't say the Defendant's representations, but the information which was contained in the Defendant's files. There has been, and the Court recognizes from the testimony of all of the expert witnesses, an evolution in the knowledge of the dangers of radiation from 1971 to the present time.

Having determined that the State should bear the burden, the question becomes what is the standard? How much money? How much has Plaintiff been damaged? And the Federal Act still comes into play at this point in time. The first area that the Court looked at is whether the proper standard would be the value of the property, and if that were to be the proper standard, when? What time? Now? Does the [p. 23] property have any value now? The property now, as diminished? The difference between what it was worth before they discovered the radiation and what it's worth now that there's radiation there? If at some earlier time, what earlier time? The date of purchase, so it's the purchase price? The date of its highest value? Because there was testimony about a land boom when Amax was there, and there has been testimony about a land bust in the Gunnison area since Amax moved out. How about in light of the UMTRA program that's going to clean up the property?

Well, as the Court has indicated under the federal program, UMTRA will either purchase the property or clean it up and return it in an uncontaminated state, which might or might not, I can't tell, result in a winfall [sic] of about 35.4 acres of cleaned property that the Plaintiff did not anticipate that it was buying in 1973. For all of these unknowns and variables, and particularly because UMTRA is going to address this property, the

Court concludes that the value of the property is not the proper measure of the damages to the Plaintiff.

The Court concludes that the alternative, loss of use is the proper standard, by which to measure how much has been taken, and how much should therefore be compensated. The loss of use has to be calculated between the time of the effective taking and what is now the estimated time of [p. 24] cleanup by the federal program. The Court is making the following calculations: Although the federal program is due to expire in 1990, there was a good deal of testimony that this land cannot be cleaned up by 1990. The first piece of dirt hasn't been moved. There is no plan in place, and that won't happen for a number of years. There was further testimony that there is anticipated an extension of this cleanup program to 1993.

Next, the Court notes that the time when the use deprivation became important was approximately May of 1984, when the O.C. Coal lease was terminated, because the coal company could not store coal as it wished on that particular property. So, we are looking at a period, the Court believes reasonably, of loss of use from 1984 through 1993. That's nine years.

However, the Court believes that once UMTRA gets to this land, even if they clean it up and return it to the owners on site, that they will compensate for a period of time, at least the period of time when they are involved in physically moving the material. There was an estimate of six months for that process. The Court thinks that estimate is not realistic. I think it will take longer than that.

Nine years amounts to 108 months. If we assume eight months to move the material, we are talking 100

months of loss of use of this property to the Plaintiff. Having [p. 25] established a time frame, based upon what the evidence has shown before the Court, the Court then has to determine what is a reasonable value per month that they have lost the use of their property. Now, the major piece of evidence from Plaintiff was the O.C. Coal lease and the testimony of Ms. McCormick. That lease was for $7,000 per month for the storage of coal.

In addition to that, there was testimony, specific testimony, from Mr. Decker that absent that lease, there were only minimal amounts which are being realized from the property at this time; perhaps $500 to $700 per month. As a matter of fact, Mr. Decker testified that the taxes on this property are now $5,100 per year, and they are not earning that much. They pay more taxes than are in fact earned on the property right now.

With regard to the use which can be made, it has been suggested that there is storage. Various things are stored, I think, including insulation are stored in the property. The testimony was this isn't the most favorable piece of property for storage. It is unheated. It is drafty. The large building, the mill building itself, is beginning to deteriorate markedly. The Court cannot imagine how you could store anything there and ever use it for anything again. The idea in Colorado that you could say, well, we will store insulation in a building and then take [p. 26] that insulation and put it in a house or put it in an office building, knowing what has been said, especially, was testified here in this trial about radon, about radon in homes, in Grand Junction, no one is going to want that material in their building. I just don't think it has any value at all.

With regard to the $7,000 a month lease, however, certain other experts testified. Mr. Smith, the expert in damages presented by the Plaintiff, calculated the loss in three ways. One of them was loss of use, and he made an assumption that loss of use was based upon the $7,000 a month figure from the lease. Two other experts, Mr. Meiling and Mr. Manning presented by the State of Colorado disputed that.

Mr. Meiling indicated that the property was involved and could realistically be involved only in what he called dry storage, and that this was a limited use. He indicated that from 1979, that real estate on the western slope, if not amounting to a depressed state, was certainly in a recession state. He indicated that from 1979 to the present, rents in that part of the state have – rents from the 70's simply can't be realized anymore today; that industrial space there is renting at one half of what, today, of what it was renting in 1979. And he was allowed to give the opinion that Gunnison is not an attractive area for development.

[p. 27] He did not recognize the lease as reflecting market value. He indicated that either one or both of the parties were uninformed when they rented this land for coal storage at that particular rate. And his conclusion was that the lease was inconsistent with good business judgment. He indicated one of his concerns would be the concern of a banker lending money on this property, and a banker would want to know if you have a renter, how solvent is the renter, how much reliability can be placed, and whether or not that renter will remain and continue to pay the rental amount. He had serious questions as to

O.C. Coal's ability to remain and continue to pay that amount of rent.

Mr. Manning. Mr. Manning was a real estate broker in Gunnison for nineteen and one half years. More importantly, for the years 1973 through 1983, he was hired by the Plaintiff to manage this particular property. Here is a person who earns his living in the area. The Court was very impressed with Mr. Manning, with his qualifications as an expert, with his knowledge in the area. He testified that from 1973 through 1983, prior to the coal lease, the property was used mostly for storage, and he described the types of storage, storage of boats, storage of various things. He said from time to time somebody would be in the office building, but mostly it was used as storage.

When the office building was used, he indicated [p. 28] it rented at $2.00 a square foot, and the mill building was used at $1.00 a lineal foot for the boats that were stored there; boats to be used at the Blue Mesa Reservoir. He discussed the O.C. Coal lease, and he indicated that a lease at $7,000 per month for storage is not representative of the price in the Gunnison area for that type of property at the time the lease was entered into. He testified it was above the normal market value at that time.

He testified about the late 1970's. What he described the land around Gunnison as experiencing then was run away speculation, due to the Amax Company being there. He indicated this run away speculation continued until 1982 or 1983. He indicated that during this time, however, from 1973 through '83, this particular property continued

to rent at approximately the same rate for that entire time period.

The Court has to look, then, at that lease, and has to determine is that a fair and representative value for the loss of use to the Plaintiff. Under all of the circumstances, the circumstances before the lease for ten years, the circumstances after the lease was terminated, the value of the property in and around the Gunnison area, the Court concludes that the $7,000 a month lease was an anomaly and was not reflective of the true value. It might have been based on excellent business work by the partners in Plaintiff partnership, but it isn't a fair value, and it's not right. [p. 29] And that's what the Court concludes.

The Court similarly disregards Mr. Smith's income approach, because it is based on the O.C. Coal lease. The Court has to look at what we are – what realistically can be obtained on that piece of property, and it will consider the ten years prior to entering the lease, as well as the time since then. The time since that time has been a time of depressed real estate conditions in the Gunnison area. I'm not talking about depressed on this particular piece of property, because it has the radiation on it, and probably nobody is going to touch it, but the entire area is in a depressed condition.

The testimony of Mr. Decker that in the present condition, it makes $500 to $700 a month. I think that's a little low. I think that is not truly reflective of what we are seeing or could reasonably expect to see for this particular land. Under all of the circumstances, the Court finds that a reasonable rental value for the 25 acres of the mill yard, and this, therefore, is an amount that has been lost

by the Plaintiff, is $2,000 a month for 100 months. I think that comes out to $200,000.

It is, therefore, the judgment of the Court that there has been a compensable taking under the Colorado Constitution, and that the loss of use is the proper standard, and that the amount to be awarded to the Plaintiff [p. 30] in this case is $200,000.

Those are the findings of fact, conclusions of law, and judgment of the Court.

Court is in recess.

(The proceedings were concluded.)

REPORTER'S CERTIFICATE

The above and foregoing is a true and complete transcription of my stenotype notes taken in my capacity as Official Reporter of Division 20, District Court, Denver, Colorado, at the times and place above set forth.

Dated at Denver, Colorado, May 8th, 1987.

/s/ Karen Ann Shain
Karen Ann Shain, CSR

APPENDIX H

SUPREME COURT, STATE OF COLORADO

Case No. 93 SC 418

THE MILL'S PETITION FOR REHEARING

STATE OF COLORADO, DEPARTMENT OF HEALTH,

Petitioner,

vs.

THE MILL, a Limited Partnership,

Respondent.

En Banc
Opinion by Justice Mary J. Mullarkey

Certiorari to the Court of Appeals, State of Colorado
Case No. 87 CA 0502 (Consolidated)

Appeal from the District Court,
City and County of Denver,
State of Colorado
Case No. 86 CV 3945
Honorable H. Jeffrey Bayless

and

Appeal from the District Court, County of Gunnison
State of Colorado
Case No. 89 CV 116
Honorable Thomas J. Goldsmith

January 3, 1995

HOLLEY, ALBERTSON & POLK, P.C.
George Alan Holley #1266
Eric E. Torgersen #16245
Attorneys for The Mill
Suite 100, Building 19
1667 Cole Boulevard
Golden, Colorado 80401-3313
(303) 233-7838

COMES NOW the Respondent, The Mill, a limited partnership ("The Mill"), by and through its attorneys HOLLEY, ALBERTSON & POLK, P.C., and submits the following Petition for Rehearing in the above entitled appeal.

I.

ISSUES PRESENTED FOR REVIEW.

A. Whether a state's regulatory action effects a compensable taking is a fact question to be determined at trial.

B. Whether property must be valued for purposes of an UMTRAP condemnation without regard to the cost of cleanup for existing radioactive contamination.

II.

ARGUMENT.

A. *Whether CDOH's Actions Effected a Regulatory Taking of The Mill's Property was a Factual Question Decided by the District Court.*

This Court should reconsider its decision that the State of Colorado, Department of Health ("CDOH") did

not effect a regulatory taking of The Mill's property because this Court has substituted its judgment for that of the fact-finder. After hearing a six day trial on disputed evidence, the District Court found as a matter of fact that CDOH had effected a regulatory taking of The Mill's property beginning in May, 1984. Those findings were amply supported in the record and are binding on review. *M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380 (Colo. 1994). This Court concludes that The Mill did not have reasonable investment backed expectations for its property and therefore CDOH did not "go too far" in regulating The Mill's property and give rise to a claim for compensation. However, by concluding that The Mill's investment backed expectations were unreasonable given the property's history, this Court substituted its own judgment for the finder of fact. This Court has clearly expressed its disfavor with an appellate court ignoring the facts found by the trial court, *see Mortimer,* 866 P.2d at 1380, and this Court should not depart from its own articulated principles.

Whether The Mill had reasonable investment backed expectations for its property was determined by the District Court based upon The Mill's exhaustive review of all information available to it, including its review of CDOH's official files concerning the property. Although the District Court may not have articulated its findings specifically[1], the District Court found as a matter of fact

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[1] The District Court reached its decision in April 1987. The bulk of precedent upon which this Court relies has been set down since that time. *See, e.g., Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S.Ct. 2886 (1992).

that The Mill had reasonable investment backed expectations for its property. The Mill reviewed and inspected CDOH's official files prior to purchasing the property, and learned that the mill yard parcel had been delicensed and was safe for unrestricted use. The Mill was entitled to rely on the termination of that license, *see City and County of Denver v. Stackhouse*, 135 Colo. 289, 310 P.2d 296 (1957), and its right to use its property for legal uses consistent with "ordinary" limits on property ownership, such as zoning.

This Court also concludes that even if The Mill did not use its property in a manner which would constitute a nuisance, *see e.g., Miller v. Carnation Company*, 33 Colo. App. 62, 516 P.2d 661 (1972), this Court nevertheless concludes that The Mill's property was akin to personal property and could be regulated as such. However, this Court's reading of *Lucas* goes too far, since there were no limitations on The Mill's use of its property which were inherent in the title at the time The Mill acquired its property. *See Lucas*, 112 S.Ct. at 2886, 2899-2900. *Lucas* gives no indication that personal property principles can be extrapolated to allow the state to regulate real property out of existence. *See Lucas*, 112 S.Ct. at 2886, 2899. Moreover, as the dissent points out, this Court's treatment of The Mill's *real* property as personal property is contrary to established jurisprudence already laid down in this state. *See Property Tax Administration v. Production Geophysical*, 860 P.2d 514 (Colo. 1993).

B. *The Property Owner is Entitled to the Decontaminated Fair Market Value in an UMTRAP Condemnation.*

This Court should also reconsider its decision that a property owner cannot receive the decontaminated fair market value of its property in a condemnation brought pursuant to the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. §§ 7901, *et seq.* (1991) ("UMTRAP"). This Court concludes that applying the rule against enhancement codified in C.R.S. § 24-56-117(1)(c) (1988) bars evidence of the decontaminated value of the property, affirming *Department of Health v. Hecla Mining Company*, 781 P.2d 122 (Colo. App. 1989). However, as the Court of Appeals decided in *The Mill v. State Department of Health*, 868 P.2d 1099 (Colo. App. 1993), *Hecla* is incorrect. There, as here, the cost of cleanup far exceeds the property's fair market value once the property is fully remediated. Thus, ordinary principles of appraisal would require that the clean up cost be subtracted from the fair market value, *see Board of County Commissioners v. Tenbrook*, 491 P.2d 597 (Colo. App. 1971), and the twenty-two UMTRAP processing sites likely have a zero fair market value under those circumstances.

The rule against enhancement precludes evidence of comparable sales which reflect an increase in value based upon the public works project contemplated by the condemnation. *See State Department of Highways v. Town of Silverthorne*, 707 P.2d 1017 (Colo. App. 1985). However, that rule is inconsistent with condemnations of processing sites under UMTRAP, because the U.S. Department of Energy ("DOE") is obligated to clean up each of the designated processing sites at no cost to the property

owner. To carry out UMTRAP, DOE enters into a cooperative agreement with the states where the sites are located. The cooperative agreement makes the state DOE's agent for purposes of land acquisition, unless DOE can arrange with the property owner for "voluntary" access to clean up the property. Whether to acquire a particular property lies in the discretion of DOE; however, DOE must give consideration to the prevention of windfall profits in determining whether to acquire a particular parcel. 42 U.S.C. § 7914. UMTRAP does not define windfall profits, but the cost of cleanup cannot be considered as part of that windfall, since DOE is obligated to clean up the property irrespective of whether it acquires the property.[2] In this case, DOE determined to acquire The Mill's property based upon contamination of the Gunnison aquifer.

In addition, applying the rule against enhancement in this case violates The Mill's right to equal protection. Although this Court separates owners of processing sites into two classes, the class must consist of only those owners of the twenty-two processing sites identified in UMTRAP. These class members are not treated similarly with respect to the cleanup process, since some have their property returned in its cleaned up condition and others have their property taken without any compensation, if this Court's ruling is applied. There is no rational basis to treat the owners of processing sites dissimilarly, since

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[2] Congress' admonition against windfall profits could just as easily be directed at those owners of processing sites who, unlike The Mill, caused the radioactive contamination and who did not clean up the property, but who would have the property cleaned up by DOE and returned to them at no cost.

DOE's obligated to clean up all twenty-two UMTRAP processing sites regardless of whether any of those sites are acquired by DOE. *See, e.g., Zavala v. City and County of Denver,* 759 P.2d 664 (Colo. 1988). Therefore, applying the rule against enhancement violates The Mill's right to equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments and Article II, Section 25 of the Colorado Constitution.

Finally, this Court's decision to apply the rule against enhancement effectively amounts to a physical taking of The Mill's property without just compensation as required by the Fifth Amendment and Article II, Section 15 of the Colorado Constitution. *See City of Northglenn v. Grynberg,* 846 P.2d 175, 178 (Colo. 1993); *Kirk v. Denver Publishing Company,* 818 P.2d 262 (Colo. 1991). Were it not for DOE's decision to acquire The Mill's entire sixty-one acre parcel in 1990, DOE would have cleaned up the property and would have returned it to The Mill when the property was remediated. The Mill would have had its entire sixty-one acre parcel free of contamination at no cost to it and the property would then have had a *positive* fair market value. Since DOE could not be compelled to clean up and return The Mill's property, The Mill is entitled to the fair market value of the property determined under C.R.S. §§ 38-1-101, *et seq.* (1982), without regard to the cost of cleanup.

IV.

CONCLUSION.

For all of the foregoing reasons, The Mills [sic] prays that the Court affirm the Court of Appeals, ruling in this

case, and for such other and further relief as the Court deems just and proper.

HOLLEY, ALBERTSON &
POLK, P.C.

/s/ Eric E. Torgersen
George Alan Holley #1266
Eric E. Torgersen #16245
Attorneys for The Mill
1667 Cole Boulevard,
Suite 100
Golden, Colorado 80401
(303) 233-7838

APPENDIX I

DISTRICT COURT, COUNTY OF GUNNISON,
STATE OF COLORADO

Case No. 89 CV 116

STIPULATION

DEPARTMENT OF HEALTH, STATE OF COLORADO,

Petitioner,

Vs.

THE MILL, a limited partnership; and
THE TREASURER FOR GUNNISON COUNTY,

Respondents.

COME NOW the petitioner, Department of Health, State of Colorado ("CDOH"), by and through the undersigned attorney general, and the respondent, The Mill ("The Mill"), by and through its attorneys, HOLLEY, ALBERTSON & POLK, P.C., and submit the following Stipulation in lieu of presentation of evidence for an immediate possession hearing pursuant to Section 38-1-105(6), C.R.S., subject to the following.

CDOH and The Mill hereby stipulate and agree as follows:

1. The issues to be resolved by the Court for the immediate possession hearing in this condemnation action are: (i) whether CDOH has a public purpose for condemning The Mill's property described in the Amended Petition; (ii) the fair market value of the property CDOH seeks to acquire; (iii) whether good faith negotiations have taken place as required by Section

38-1-102, C.R.S.; and (iv) whether CDOH can demonstrate the necessity for possession of the property immediately.

2. With respect to the issues set forth in paragraph No. 1, CDOH and The Mill stipulate to the following facts:

(a) Decontaminating The Mill's property, which is presently contaminated with radioactive material, is a public purpose as set forth by statute in the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. Section 7901, et seq., and the Colorado Radiation Control Act, Section 25-11-301, et seq., C.R.S.

(b) In its present condition, the cost of remedial action and cleanup of The Mill's property to properly decontaminate it exceeds the fair market value which the property would otherwise have if completely uncontaminated. Therefore, in its present condition, the value of The Mill's property is zero.

(c) Prior to commencing the present condemnation described in the Amended Petition, by a letter dated September 20, 1990, CDOH offered to purchase The Mill's property for an amount greater than the zero fair market value. This offer was rejected by The Mill by a letter dated October 19, 1990. Based upon this offer, CDOH has conducted negotiations prior to commencing the present eminent domain proceeding.

(d) CDOH has the necessity for immediate possession of The Mill's property in order to commence the remedial action and decontamination operations which are the purpose of the present condemnation proceeding.

3. CDOH and The Mill further stipulate and agree as follows:

(a) CDOH shall present a Motion for Immediate Possession supported by this Stipulation in lieu of a hearing to which The Mill is otherwise entitled by statute. The Mill stipulates that it does not object to the presentation of such a motion.

(b) If the Court approves CDOH's motion, CDOH shall be entitled to possession immediately upon service of the Court's Order granting such possession.

(c) In the event CDOH obtains possession of The Mill's property, The Mill will not object to any proceedings before the Gunnison County Board of Commissioners for a change of use to allow the remedial and cleanup operations contemplated by CDOH's Amended Petition, including those operations conducted by the United States Department of Energy or its subcontractors.

(d) CDOH shall not be required to make any deposit into the registry of the Court as provided by Section 38-1-105, C.R.S., based upon the parties' stipulation that the property being acquired has a zero fair market value.

FOR THE ATTORNEY GENERAL

/s/ Jerry W. Goad
Jerry W. Goad #11284
First Assistant Attorney General
Natural Resources Section
Attorneys for CDOH
110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: 620-4716

HOLLEY, ALBERTSON & POLK, P.C.

/s/ Eric E. Torgersen
George Alan Holley # 1266
Eric E. Torgersen #16245
Attorneys for Respondent
1667 Cole Boulevard, Suite 100
Golden, Colorado 80401
Telephone: (303) 233-7838

APPENDIX J

PART 3

DISPOSAL OF URANIUM MILL TAILINGS

25-11-301. Legislative declaration. The general assembly hereby finds and declares that the existence of uranium mill tailings at active and inactive mill operations poses a potential and significant radiation health hazard. This part 3 is therefore enacted to protect the public health, safety, and welfare by cooperating with the federal government in providing for the stabilization, disposal, and control of such tailings in a safe and environmentally sound manner to prevent or minimize other environmental impacts from such tailings.

25-11-302. Terms defined. For the purposes of this part 3, the terms "processing site" and "residual radioactive material" shall have the meanings specified in section 101 (6) and (7), respectively, of Public Law 95-604, as from time to time amended.

25-11-303. Authorization to participate – implementation. (1) The general assembly hereby authorizes the department of health to participate in federal implementation of the "Uranium Mill Tailings Radiation Control Act of 1978", and for such purpose the department has the authority to:

(a) Enter into cooperative agreements with the secretary of energy to perform remedial actions at processing sites designated by the secretary;

(b) Obtain written consent from the record owner of a designated processing site to perform remedial actions at such site;

(c) Provide for reimbursement for the actual cost of any remedial action in accordance with the terms of Public Law 95-604;

(d) (I) Acquire by gift, transfer, exchange, or purchase pursuant to the requirements of article 56 of title 24, C.R.S., any designated processing site, including any interest in such site, and any site to be used for the permanent disposition and stabilization of residual radioactive materials. Acquisition of any such sites shall be for the purpose of performing remedial action and ultimate disposition of the site as required under the federal "Uranium Mill Tailings Radiation Control Act of 1978".

* * *

(III) If the acquisition of any such site is not accomplished pursuant to the arbitration procedures established in subparagraph (II) of this paragraph (d), the department is authorized to obtain such site by condemnation proceedings pursuant to the provisions of article 1 of title 38, C.R.S.A. decision made pursuant to the provisions of article 1 of title 38, C.R.S., shall be made in accordance with the criteria established in section 24-56-117 (1) (c), C.R.S., and the provisions of the federal "Uranium Mill Tailings Radiation Control Act of 1978".

(IV) This paragraph (d) is repealed, effective upon the acquisition of all of the nine currently designated sites, as certified by the executive director of the department, for purposes of participating in the federal "Uranium Mill Tailings Radiation Control Act of 1978".

(e) Participate in the selection and performance of remedial actions in which the state pays a portion of the cost.

APPENDIX K

24-56-117. Real property acquisition policies. (1) Any state agency or political subdivision of the state which acquires real property for a program or project for which federal financial assistance will be available to pay all or any part of the cost of such program or project shall comply with the following policies:

* * *

(c) Before the initiation of negotiations for acquisition of real property, an amount shall be established which it is reasonably believed is just compensation therefor, and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of and summary of the basis for the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

* * *

APPENDIX L

§ 7901. Congressional Findings and purposes

(a) The Congress finds that uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.

(b) The purposes of this chapter are to provide –

(1) in cooperation with the interested States, Indian tribes, and the persons who own or control inactive mill tailings sites, a program of assessment and remedial action at such sites, including, where appropriate, the reprocessing of tailings to extract residual uranium and other mineral values where practicable in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public, and

(2) a program to regulate mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public.

§ 7911. Definitions

For purposes of this subchapter –

(1) The term "Secretary" means the Secretary of Energy.

(2) The term "Commission" means the Nuclear Regulatory Commission.

(3) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * *

(5) The term "person" means any individual, association, partnership, corporation, firm, joint venture, trust, government entity, and any other entity, except that such term does not include any Indian or Indian tribe.

(6) The term "processing site" means –

(A) any site, including the mill, containing residual radioactive materials at which all or substantially all of the uranium was produced for sale to any Federal agency prior to January 1, 1971, under a contract with any Federal agency,

* * *

and

(B) any other real property or improvement thereon which –

(i) is in the vicinity of such site, and

(ii) is determined by the Secretary, in consultation with the Commission, to

be contaminated with residual radioactive materials derived from such site.

* * *

(7) The term "residual radioactive material" means –

(A) waste (which the Secretary determines to be radioactive) in the form of tailings resulting from the processing of ores for the extraction of uranium and other valuable constituents of the ores; and

(B) other waste (which the Secretary determines to be radioactive) at a processing site which relate to such processing, including any residual stock of unprocessed ores or low-grade materials.

(8) The term "tailings" means the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.

* * *

§ 7912. Processing site designations

(a) Specific and other site locations; remedial action; consultations; boundaries; Grand Junction, Colorado site restriction

(1) As soon as practicable, but no later than one year after November 8, 1978, the Secretary shall designate processing sites at or near the following locations:

Salt Lake City, Utah
Green River, Utah
Mexican Hat, Utah

Durango, Colorado
Grand Junction, Colorado
Rifle, Colorado (two sites)
Gunnison, Colorado
Naturita, Colorado
Maybell, Colorado
Slick Rock, Colorado (two sites)
Shiprock, New Mexico
Ambrosia Lake, New Mexico
Riverton, Wyoming
Converse County, Wyoming
Lakeview, Oregon
Falls City, Texas
Tuba City, Arizona
Monument Valley, Arizona
Lowman, Idaho
Cannonsburg, Pennsylvania

Subject to the provisions of this subchapter, the Secretary shall complete remedial action at the above listed sites before his authority terminates under this subchapter.

* * *

§ 7913. State cooperative agreements

(a) Authority of Secretary; prompt commencement of preparations

After notifying a State of the designation referred to in section 7912 of this title, the Secretary subject to section 7923 of this title, is authorized to enter into cooperative agreements with such State to perform remedial actions at each designated processing site in such State. . . .

* * *

The Secretary shall, to the greatest extent practicable, enter into such agreements and carry out such remedial actions in accordance with the priorities established by him under section 7912 of this title. The Secretary shall commence preparations for cooperative agreements with respect to each designated processing site as promptly as practicable following the designation of each site.

(b) Terms and conditions; limitation of Federal assistance

Each cooperative agreement under this section shall contain such terms and conditions as the Secretary deems appropriate and consistent with the purposes of this chapter, including, but not limited to, a limitation on the use of Federal assistance to those costs which are directly required to complete the remedial action selected pursuant to section 7918 of this title.

(c) Written consent of record interest holder; waiver

(1) Except where the State is required to acquire the processing site as provided in subsection (a) of section 7914 of this title, each cooperative agreement with a State under this section shall provide that the State shall obtain, in a form prescribed by the Secretary, written consent from any person holding any record interests in the designated processing site for the Secretary or any person designated by him to perform remedial action at such site.

(2) Such written consent shall include a waiver by each such person on behalf of himself, his heirs, successors, and assigns –

(A) releasing the United States of any liability or claim thereof by such person, his heirs, successors, and assigns concerning such remedial action, and

(B) holding the United States harmless against any claim by such person on behalf of himself, his heirs, successors, or assigns arising out of the performance of any such remedial action.

* * *

§ 7914. Acquisition and disposition of lands and materials

(a) State acquisition; windfall profits prevention

Each cooperative agreement under section 7913 of this title shall require the State, where determined appropriate by the Secretary with the concurrence of the Commission, to acquire any designated processing site, including where appropriate any interest therein. In determining whether to require the State to acquire a designated processing site or interest therein, consideration shall be given to the prevention of windfall profits.

(b) Disposition and stabilization site for residual radioactive materials; Federal site available

(1) If the Secretary with the concurrence of the Commission determines that removal of residual radioactive material from a processing site is appropriate, the

cooperative agreement shall provide that the State shall acquire land (including, where appropriate, any interest therein) to be used as a site for the permanent disposition and stabilization of such residual radioactive materials in a safe and environmentally sound manner.

(2) Acquisition by the State shall not be required under this subsection if a site located on land controlled by the Secretary or made available by the Secretary of the Interior pursuant to section 7916(2) of this title is designated by the Secretary, with the concurrence of the Commission, for such disposition and stabilization.

* * *

(e) State disposition; terms and conditions; fair market value; offer of sale to prior owner

(1) The terms and conditions of any cooperative agreement with a State under section 7913 of this title shall provide that in the case of any lands or interests therein acquired by the State pursuant to subsection (a) of this section, the State, with the concurrence of the Secretary and the Commission, may –

(A) sell such lands and interests,

(B) permanently retain such land and interests in lands (or donate such lands and interests therein to another governmental entity within such State) for permanent use by such State or entity solely for park, recreational, or other public purposes, or

(C) transfer such lands and interests to the United States as provided in subsection (f) of this section.

No lands may be sold under subparagraph (A) without the consent of the Secretary and the Commission. No site may be sold under subparagraph (A) or retained under subparagraph (B) if such site is used for the disposition of residual radioactive materials.

(2) Before offering for sale any lands and interests therein which comprise a processing site, the State shall offer to sell such lands and interests at their fair market value to the person from whom the State acquired them.

(f) Transfer of title to Secretary; payment from funds for administrative and legal costs; custody of property; compliance with health and environmental standards for uranium mill tailings; transfer of title restriction

(1) Each agreement under section 7913 of this title shall provide that title to –

> **(A)** the residual radioactive materials subject to the agreement, and
>
> **(B)** any lands and interests therein which have been acquired by the State, under subsection (a) or (b) of this section, for the disposition of such materials,

shall be transferred by the State to the Secretary when the Secretary (with the concurrence of the Commission) determines that remedial action is completed in accordance with the requirements imposed pursuant to this subchapter. No payment shall be made in connection with the transfer of such property from funds appropriated for purposes of this chapter other than payments for

any administrative and legal costs incurred in carrying out such transfer.

* * *

(g) Reimbursement; fair market value; deposits in Treasury

Each agreement under section 7913 of this title which permits any sale described in subsection (e)(1)(A) of this section shall provide for the prompt reimbursement to the Secretary from the proceeds of such sale. Such reimbursement shall be in an amount equal to the lesser of –

> **(1)** that portion of the fair market value of the lands or interests therein which bears the same ratio to such fair market value as the Federal share of the costs of acquisition by the State to such lands or interest therein bears to the total cost of such acquisition, or
>
> **(2)** the total amount paid by the Secretary with respect to such acquisition.

The fair market value of such lands or interest shall be determined by the Secretary as of the date of the sale by the State. Any amounts received by the Secretary under this subchapter shall be deposited in the Treasury of the United States as miscellaneous receipts.

* * *

§ 7917. financial assistance

(a) Federal and non-Federal funds; administrative costs

In the case of any designated processing site for which an agreement is executed with any State for remedial action at such site, the Secretary shall pay 90 per centum of the actual cost of such remedial action, including the actual costs of acquiring such site (and any interest therein) or any disposition site (and any interest therein) pursuant to section 7913 of this title, and the State shall pay the remainder of such costs from non-Federal funds. The Secretary shall not pay the administrative costs incurred by any State to develop, prepare, and carry out any cooperative agreement executed with such State under this subchapter, except the proportionate share of the administrative costs associated with the acquisition of lands and interests therein acquired by the State pursuant to this subchapter.

* * *

§ 7918. Remedial action and mineral recovery activities

(a) General standards for remedial action; Federal performance and State participation; use of technology; promulgation of standards

(1) The Secretary or such person as he may designate shall select and perform remedial actions at designated processing sites and disposal sites in accordance with the general standards prescribed by the Administrator pursuant to section 275a. of the Atomic Energy Act of 1954. The State shall participate fully in the selection and

performance of a remedial action for which it pays part of the cost. Such remedial action shall be selected and performed with the concurrence of the Commission and in consultation, as appropriate, with the Indian tribe and the Secretary of the Interior.

* * *

§ 7925. Active operations; liability for remedial action

(a) No amount may be expended under this subchapter with respect to any site licensed by the Commission under the Atomic Energy Act of 1954 or by a State as permitted under section 274 of such act at which production of any uranium product from ores (other than from residual radioactive materials) takes place.

(b) In the case of each processing site designated under this subchapter, the Attorney General shall conduct a study to determine the identity and legal responsibility which any person (other than the United States, a State, or Indian tribe) who owned or operated or controlled (as determined by the Attorney General) such site before November 8, 1978, may have under any law or rule of law for reclamation or other remedial action with respect to such site. The Attorney General shall publish the results of such study, and provide copies thereof to the Congress, as promptly as practicable following November 8, 1978. The Attorney General, based on such study, shall to the extent he deems it appropriate and in the public interest, take such action under any provision of law in effect when uranium was produced at such site to require payment by such person of all or any part of

the costs incurred by the United States for such remedial action for which he determines such person is liable.

* * *

APPENDIX M

U.S. Department of Energy
Agreement No. DE-FC04-81AL16257

COOPERATIVE AGREEMENT

This AGREEMENT, entered into between the UNITED STATES OF AMERICA (hereinafter called the "Government"), acting through the DEPARTMENT OF ENERGY (hereinafter called "DOE"), and the STATE OF COLORADO (hereinafter called the "State"), acting through the COLORADO DEPARTMENT OF HEALTH.

* * *

NOW THEREFORE, the parties hereto mutually agree as follows:

I. DEFINITIONS

As used throughout this Agreement, the following terms shall have the meanings set forth below:

A. The term "Secretary" means the Secretary of Energy or any duly authorized representative thereof.

B. The term "DOE" means the United States Department of Energy or any duly authorized representative thereof, including the Secretary and the Contracting Officer.

C. The term "Contracting Officer" means the person executing this Agreement on behalf of the Government, and any other officer or civilian employee who is properly designated as a Contracting Officer; and the term includes, except as otherwise provided in this Agreement, the authorized representative of a Contracting Officer acting within the limits of his authority.

D. The term "Commission" means the United States Nuclear Regulatory Commission or any duly authorized representative thereof.

E. The term "Administrator" means the Administrator of the United States Environmental Protection Agency or any duly authorized representative thereof.

F. The term "State" means the State of Colorado or any duly authorized representative thereof.

G. The term "State Site Representative" means the Executive Director, Colorado Department of Public Health, and, as authorized by the Executive Director, any duly authorized representative thereof.

H. The term "person" means any individual, association, partnership, corporation, firm, joint venture, trust, government entity, and any other entity, except that such term does not include any Indian or Indian tribe.

I. The term "millsite" means any inactive uranium mill tailings site within the State of Colorado, including any residual radioactive materials thereon, which the Secretary has designated (44 F.R. 74891) pursuant to Section 102(a) of the Act to be a "processing site" and which is further described in Appendix A to this Agreement.

J. The term "vicinity property" means any real property or improvement thereon which: (1) is in the vicinity of a millsite; (2) is determined by the Secretary, in consultation with the State and the Commission, to be contaminated with residual radioactive materials derived from a millsite; and (3) the Secretary designates, during the term of this Agreement and pursuant to Section 102(e) of the Act, to be a "processing site"; and

includes any residual radioactive materials thereon.

K. The term "residual radioactive materials" means: (1) waste at a millsite or vicinity property, which DOE determines to be radioactive, in the form of tailings resulting from the processing of ores for the extraction of uranium and other valuable constituents of the ores; and (2) other waste, which DOE determines to be radioactive, at a millsite or vicinity property which relates to such processing, including any residual stock of unprocessed ores or low-grade materials.

L. The term "tailings" means the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.

M. The term "EPA Standards" means those standards, promulgated as standards by rule of the Administrator pursuant to Section 275 of the Atomic Energy Act, as amended, of general application for the protection of the public health, safety, and the environment from radiological and nonradiological hazards associated with residual radioactive materials located at mill sites, vicinity properties and depository sites.

N. The term "depository site" means any site, which may include the mill site or vicinity property, used for the permanent disposition, stabilization and control of residual radioactive materials in accordance with and pursuant to this Agreement and Title I of the Act.

O. The term "remedial action" means the performance, and the assessment, design and technical effort directly related to the performance, of stabilization and control of residual radioactive materials at a millsite, vicinity property or depository site in a safe and environmentally sound manner in order to minimize or eliminate radiation health hazards to the public.

P. The term "Remedial Action Plan" means the document, as further described in Article II, "Description of Remedial Action Program," developed by DOE and executed by DOE and the State in order to define the remedial action to be performed at a millsite pursuant to this Agreement, including, where appropriate, removal of residual radioactive materials to a depository site, and which also includes a discussion of the proposed means of accomplishing such remedial action, the estimated costs of design and performance of remedial action, project status and technical information reporting requirements, and a schedule of activities for such remedial action.

Q. The term "Radiological and Engineering Assessment" means the document, as further described in Article II, "Description of Remedial Action Program," developed by DOE and concurred with by the State in order to define the remedial action to be performed at a vicinity property pursuant to this Agreement, and which includes a detailed radiological and engineering assessment of that vicinity property, and an estimated cost of design and performance of the remedial action.

R. The term "environmental document" means a written public document, such as an environmental assessment or environmental impact statement, which contains an appropriate environmental analyses of the preferred remedial action and all reasonable alternatives, and which is prepared in such format and in accordance with such procedures as prescribed by the Council on Environmental Quality National Environmental Policy Act Regulations, 40 CFR Parts 1500-1508, and the DOE National Environmental Policy Act Guidelines, published at 45 FR 20694-20701 on March 28, 1980.

S. The term "advance by Treasury check" means a payment made by DOE to the State by Treasury check, in accordance with the provisions of Treasury Circular No. 1075, upon request by the State before cash outlays are made for allowable costs incurred or anticipated to be incurred by the State.

T. The term "reimbursement by Treasury check" means a payment made by DOE to the State by Treasury check upon request by the State for reimbursement for cash outlays made for allowable costs.

U. The term "program income" means the State's share of proceeds from: (1) any sale by the State of a millsite or vicinity property pursuant to Article III, "Acquisition, Disposition and Use of Property;" and (2) any remilling of residual radioactive materials done pursuant to Article II, "Description of Remedial Action Program," and Section 108(b) of the Act. Program income does not include any interest earned on advances of Government funds pursuant to this Agreement.

V. The term "subcontractor" means any contractor to the State and all tiers of subcontractors thereunder.

W. Except as otherwise provided in this Agreement, the term "subcontracts" includes purchase orders under this Agreement.

II. DESCRIPTION OF REMEDIAL ACTION PROGRAM

A. The Secretary, pursuant to Section 102 of the Act, has designated millsites located within the State of Colorado and the relative priorities for carrying out remedial action as follows:

Millsite	Priority
Durango	High
Grand Junction	High
Gunnison	High
New Rifle	High
Old Rifle	High
Naturita	Medium
Maybell	Low
Slick Rock (North Continent)	Low
Slick Rock (Union Carbide)	Low

* * *

B. For each millsite, DOE and the State shall develop, in accordance with the relative priority of remedial action to the greatest extent practicable, a Remedial Action Plan for performance of remedial action at such millsite and its associated vicinity properties; *PROVIDED*, that DOE and the State may execute one Remedial Action Plan for a combination of two or more millsites, e.g., the following combinations of sites: (1) Old Rifle and New Rifle; and (2) Slick Rock (North Continent) and Slick Rock (Union Carbide).

* * *

E. Subject to the requirements of this article, DOE, or such person as the Contracting Officer may designate, shall select and perform the remedial action at the millsite, vicinity properties, and the depository site in accordance with the EPA standards. Remedial action shall be carried out, to the greatest extent practicable, in accordance with the priorities established by DOE pursuant to Section 102 of the Act, and published at 44 F.R. 74891, 74892 (1979). Remedial action shall not be implemented until the owner or owners of the millsite or vicinity property agree to the performance of such remedial action or the State has made any necessary acquisition of the millsite or vicinity property, or an appropriate interest therein, pursuant to Article III, "Acquisition, Disposition and Use of Property."

* * *

III. ACQUISITION, DISPOSITION, AND USE OF PROPERTY

A. As requested in writing by the Contracting Officer, the State shall prepare, collect and develop the documentation described in Appendix C of this Agreement in connection with the millsite and any improvement thereon.

In connection with: (1) the residual radioactive materials at the millsite and any vicinity property at which remedial action is to be performed; (2) the land to be used as a depository site; and (3) any vicinity property; the Contrasting Officer shall request, and the State shall prepare, collect and develop, the documentation

described in Appendix C only when such property is seriously under consideration by DOE for acquisition.

The State Site Representative shall, within 90 days from such request from the Contracting Officer, furnish to the Contracting Officer two copies of the documentation developed pursuant to this paragraph. DOE, after informing the State of its intent to do so, may prepare, collect and develop any or all of the documentation described in Appendix C in connection with a millsite, vicinity site, or depository site, and the costs associated with such preparation, collection and development shall be an allowable cost in accordance with Article V, "Payments and Allowable Costs."

B. The Contracting Officer shall review the documentation, including the appraisal report, furnished by the State for its adequacy under Appendix C, the Uniform Appraisal Standards for Federal Land Acquisitions (hereinafter referred to as the "Appraisal Standards") issued by the Interagency Land Acquisition Conference, and "A Procedural Guide for the Acquisition of Real Property by Government Agencies" (hereinafter referred to as the "DOJ Procedural Guide") issued by the Department of Justice. The State shall take such action as is necessary to cure any inadequacies in the documentation and appraisal report of which the State Site Representative has been notified by the Contracting Officer.

C. After consideration of the documentation submitted by the State pursuant to paragraph A of this Article, DOE shall determine whether acquisition of such property is necessary, and

DOE shall establish an amount which it determines to be a just maximum compensation (hereinafter referred to as the "Maximum Amount") for the property, and if DOE determines that the State should acquire such property, the Contracting Officer shall request the State to make such acquisition by written notice which informs the State of: (1) the acquisition required; (2) the legal description or location of the property to be acquired; (3) the estate or interest in the property to be acquired; (4) the date by which such property is to be acquired; and (5) the Maximum Amount.

* * *

D. Upon receipt of the written notice provided for in Paragraph C of this Article, the State shall promptly make every reasonable effort to negotiate a purchase price and agreement to purchase the property. The State shall not negotiate a price in excess of the Maximum Amount.

* * *

The State, if unsuccessful in negotiating a purchase price at or below the Maximum Amount, shall then consult with the Contracting Officer for further direction. DOE shall then either: (1) establish a higher Maximum Amount for continued negotiations; or (2) request that the State institute formal condemnation proceedings for acquisition of the property, in which case the State shall institute condemnation proceedings if authorized by State law.

* * *

E. In the event of condemnation by the State:

1. No owner of a site shall be required to surrender possession before the State pays, to the extent required under State law, the agreed purchase price or deposits with the appropriate State court, for the benefit of the owner, such amounts as are required to authorize the State to take title pending outcome of a condemnation proceeding.

2. In no event shall the State: (1) advance the time for condemnation; (2) defer negotiations or condemnation and the deposit of funds in State court for the use of the owner; or (3) take any other action coercive in nature; in order to compel an agreement on the price to be paid for the site.

* * *

H. The State shall assure that DOE, the Commission, the Administrator, and the State shall have: (1) a permanent right of entry to inspect the millsite at any time; (2) a right of entry to inspect the depository site at any time from the time the State acquires the depository site until the time the State transfers title to the site to the Government; and (3) a right of entry until completion of remedial action to inspect at any time any vicinity property; in furtherance of the provisions of Title I of the Act and to carry out this Agreement and to enforce the provisions of the Act and any rules prescribed thereunder.

I. Except where the State has acquired fee title to the millsite or a vicinity property pursuant to this article, the State and DOE shall, prior to any remedial action performed pursuant to this Agreement, obtain from any person holding any

record interest in the designated millsite or vicinity property, execution of a Remedial Action Agreement, in a form prescribed by the Contracting Officer, which provides for the State and DOE to perform remedial action at the millsite or vicinity property. Such agreement shall: (1) include a waiver by each such person on behalf of himself, his heirs, successors and assigns (i) releasing the Government and State of any liability or claim thereof by such person, his heirs, successors and assigns concerning such remedial action, and (ii) holding the Government and State harmless against any claim by such person on behalf of himself, his heirs, successors, or assigns arising out of the performance of any such remedial action; (2) specify the remedial action to be performed; (3) provide that the remedial action shall be performed only by the DOE or such person as the Contracting Officer designates; and (4) include a consent to the remedial action by such person; (5) include as parties the State, DOE, and each such person holding any record interest in the millsite or vicinity property; (6) provide for the appropriate right of entry as required by paragraph H. of this article; and (7) in the case of vicinity properties, provide for transfer of title to the residual radioactive materials thereon to the Government. Whenever the State and DOE are unable to obtain a Remedial Action Agreement, the Contracting Officer shall advise the State in writing: (1) that the State is to acquire the subject site in accordance with the terms of this article; (2) that no remedial action shall be performed at the subject site; or (3) of such other determination made by DOE in connection with the subject site.

J. In the case of any property acquired by the State pursuant to this article, the State, after the completion of the remedial action and with the concurrence of the Secretary and the Commission, may: (1) sell such property or (2) permanently retain such property, or donate such property to another governmental entity within such State, for permanent use by the State or entity solely for park, recreational, or other public purposes. . . . In the event the State sells any lands and interests it acquires, the State shall promptly pay to the Secretary from the proceeds of any such sale an amount equal to the lesser of: (1) that portion of the fair market value of the property which bears the same ratio to such fair market value as the Federal share of the costs of acquisition by the State of such property bears to the total cost of such acquisition; or (2) the total amount paid by DOE with respect to such acquisition. The fair market value of such property shall be determined by DOE. Prior to the sale of the property, the State shall obtain an appraisal of the property . . . and shall submit such appraisal to the Contracting Officer. The Contracting Officer shall thereafter notify the State in writing of DOE's determination of fair market value. Before offering for sale any lands and interest therein which comprise the millsite or a vicinity site, the State shall offer to sell such lands and interests at their then fair market value to the person or persons from whom the State acquired them.

* * *

V. PAYMENTS AND ALLOWABLE COSTS

A. Allowable costs incurred by the State shall be those direct costs, as determined by the Contracting Officer in accordance with Office of Management and Budget Circular No. A-87, incurred to:

1. perform any State responsibility under Article III, "Acquisition, Disposition and Use of Property;"

2. design and perform remedial action pursuant to and in accordance with the terms and conditions of this Agreement; and

3. reimburse, in accordance with the terms and conditions of Section 103(f) of the Act, property owners for remedial action performed at vicinity properties prior to passage of the Act.

Allowable costs incurred by the State shall also include such other costs in connection with performance of the remedial action as may be approved by the Contracting Officer in writing or as otherwise mutually agreed to in writing by DOE and the State. . . .

* * *

B. Allowable costs incurred by DOE shall be those direct costs, as determined by the Contracting Officer in accordance with the general principles set forth in OMB Circular No. A-87, incurred to:

1. design and perform remedial action pursuant to and in accordance with the terms and conditions of this Agreement;

2. reimburse, in accordance with the terms and conditions of Section 103(f) of the Act, property owners for remedial action performed at vicinity sites;

3. appraise and acquire property, or any interest therein, pursuant to Section 106 of the Act; and

4. prepare, collect and develop, in accordance with Article III, "Acquisition, Disposition, and Use of Property," any or all of the documentation described in Appendix C in connection with a millsite, vicinity site, or depository site.

C. DOE shall make payment for ninety percent (90%) of all allowable costs by advance or reimbursement by Treasury check, and the State shall make payment for ten percent (10%) of all allowable costs by cash contribution. The term "cash contribution" means the State's cash payment from non-Government funds for its share of allowable costs. Such cash payments: (i) shall not be included as contributions for any other Government assistance program; (ii) shall not be made from funds paid by the Government under any other Government assistance program; and (iii) shall otherwise conform to the provisions of this Agreement and the Act.

* * *

APPENDIX C

SITE ACQUISITION DOCUMENTATION

The data described below will be collected or developed by the State upon written instruction from the Contracting Officer.

1. Description of Real Estate or Real Estate Interests. A general description of the real estate to be acquired, total acreage, availability for purchase and possible method of acquisition.

2. Parcel Descriptions. Perimeter and parcel descriptions, to be provided and used for acquisition by purchase or condemnation. A perimeter or tabular description of the total area will be based on acceptable survey data. Parcel descriptions will be furnished for each separate ownership from available public records.

3. List of Owners. A list of the owners of all parcels, including the owners of easements and other rights, and their addresses.

4. Taxes. Name and address of the taxing authority, amount of the taxes paid during the preceding tax years, current assessed value of the property to be acquired, and current tax rate.

5. Easements. A list of existing easements for rights-of-way for utilities, access roads and other purposes.

6. Vicinity Map. A vicinity map showing the location of the real property to be acquired and its proximity to

major highways, railroads, rivers, airfields, and metropolitan areas. Any significant features in its immediate and general vicinity which might affect its acquisition or its proposed use will be noted.

7. Current Use. Present residential, industrial, commercial or agricultural uses, described in enough detail so that DOE will have a full understanding of the present utilization of all parcels

8. Property Map. A property map showing:

   (1) Exterior boundaries of the real property to be acquired and each parcel.

   (2) General location of major improvements and structures.

   (3) Location of existing rights-of-way for roads, highways, railways, utilities, and for other purposes.

   (4) Approximate location and direction of flow of natural water courses.

   (5) Other pertinent information that may affect acquisition or use of the real property.

9. Subsurface Rights.

   (1) Information on any mining, oil or gas activities within the parcels proposed for acquisition as well as in the general area.

   (2) Identify: minerals currently being removed or removed since January 1, 1978; subsidence; the period during which the mining operations have taken place; possibility of termination of such operations; and whether surface or subsurface mining operations are conducted. Identify mineral interests under separate ownership and include the names and addresses of the owners.

10. Topographical and Boundary Survey. A survey made to identify individual parcels, land rights, and the metes and bounds description. A right of entry for survey and exploration must be obtained if the surveyor is going to enter the land. The survey will be accomplished so that the legal description contained in the title evidence is checked and verified. A notification should be sent to the property owners that the survey will be made.

11. Title Evidence. One of the following types of title evidence will be obtained:

    (1) Certificate of Title. A contract in which a title company certifies that title to a specific parcel of land is good and unencumbered except for the defects and encumbrances shown.

    (2) Title Insurance Policy. A contract insuring interests acquired in property against all defects in title.

    (3) Abstract of Title. A summary of all instruments of record affecting the title to a specific parcel. Abstracts are the least acceptable and should only be used when it is impossible to obtain Certificates of Title or Title Insurance Policy.

    The title evidence shall conform with the requirements of the "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States," issued by the Department of Justice. Requests for title services should be made to those companies that are acceptable to the Department of Justice. These usually include the major title companies. The local United States Attorney may assist by identifying such companies. Another source is "The Directory of the American Land Title Association" published by the American Land Title Association,

1828 L Street, Northwest, Washington, District of Columbia, 20036.

12. Relocation Assistance. An estimate of the funds needed to cover payments and services given to persons who will be displaced as a result of the acquisition, and which are authorized either under State law or the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646. Relocation assistance includes providing funds for moving and related expenses, costs incurred in searching for another location, and for actual direct losses experienced as a result of the move.

13. Appraisal. Appraisals are made to determine fair market value of each parcel of land and compensation to which each owner is entitled. The State shall, as soon as possible, obtain one appraisal for each separately owned parcel of the site. Upon the request of the Contracting Officer, the State shall obtain two appraisals for each separately owned parcel of the site whenever the Contracting Officer determines that the site acquisition is controversial or that the estimated cost of the site acquisition is over $100,000.00.

    The appraisal(s) shall be:

    a. Performed by a professional appraiser and, by experts qualified to determine and testify to the extent to which the presence of the residual radioactive materials actually diminishes or enhances the market value of the millsite. If the appraisal is contracted for by the State, the contract shall include a provision for a minimum of two updatings. The appraisal shall be updated in the event more than six months has elapsed from the time of the initial appraisal to the anticipated commencement of negotiations, and

shall be updated as of the date any property is acquired by condemnation.

b. Procured and prepared in accordance with the "Uniform Appraisal Standards for Federal Land Acquisitions" (hereinafter referred to as the "Appraisal Standards") issued by the Interagency Land Acquisition Conference, and "A Procedural Guide for the Acquisition of Real Property by Government Agencies" (hereinafter referred to as the DOJ Procedural Guide).

The State shall cause the appraiser to prepare an appraisal report which conforms with the requirements of the Appraisal Standards and the DOJ Procedural Guide.

No. 94-1706

JUN 2 1995

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE MILL, a limited partnership,
Petitioner,
vs.
STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION FOR RESPONDENT STATE OF COLORADO TO THE MILL'S PETITION FOR WRIT OF CERTIORARI

GALE A. NORTON
Attorney General
STEPHEN K. ERKENBRACK
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH*
Solicitor General
PATRICIA S. BANGERT
Deputy Attorney General

JERRY W. GOAD
First Assistant Attorney General
Natural Resources Section

Attorneys for Respondents

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5072
* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Is the issue of how to value property condemned under the Uranium Mill Tailings Radiation Control Act of 1978 an important and unresolved federal question warranting review by this Court?

2. Was the decision of the Colorado Supreme Court on regulatory takings consistent with decisions of this Court and the federal courts of appeal?

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2A Nichols, *The Law of Eminent Domain*, § 7.029[2] (Rev. 3rd Ed. 1993) 17

1978 U.S.C.C.A.N., pp. 7434, 7455, 7461, 7464, 7465 . . . . . 4, 11, 15

H.R. Rep. No. 1480 I and II, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Congressional Administrative News, Vol. 6, pp. 7433-7478 2

No. 94-1706

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE MILL, a limited partnership,
Petitioner,
vs.
STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION FOR RESPONDENT STATE OF COLORADO TO THE MILL'S PETITION FOR WRIT OF CERTIORARI

DECISION BELOW

The relevant decision of the Colorado Supreme Court is reported at 887 P.2d 993 (Colo. 1994). That decision is reproduced in Petitioner's Petition for Writ of Certiorari as Appendix A (pp. 1-51). References to it are cited herein as "Mill Appendix, p. ____."

STATUTORY PROVISION INVOLVED

Petitioner ("The Mill") has appended most relevant statutory provisions to its Petition for Writ of Certiorari.

Two additional provisions of the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), 42 U.S.C. §§ 7901 to 7942 that are relevant to the Petition are not included in The Mill's appendices. They are attached hereto as Appendix A. References to the provisions appended by The Mill are cited herein as "Mill Appendix, p. ____." The legislative history of UMTRCA, which is also relevant to the Petition, is found at H.R. Rep. No. 1480 I and II, 95th Cong., 2d Sess. (1978), *reprinted* in 1978 U.S. Code Congressional Administrative News, Vol. 6, pp. 7433-7478 and is cited herein as "1978 U.S.C.C.A.N., p. ____."

STATEMENT OF THE CASE

This case is actually two cases that were consolidated in the Colorado Court of Appeals. The first of these cases concerns a regulatory takings claim asserted by The Mill against Colorado in 1987. The second is an action by Colorado in 1989 to condemn The Mill's property pursuant to its eminent domain authority. Although both cases concern the same parcel of property, they involve distinct legal issues and rest upon different facts. The takings case involves the concept of regulatory takings, whereas the eminent domain case is strictly one of statutory construction and involves the eminent domain concepts of fair market and enhanced value.

The property at issue is located in Gunnison County, Colorado.[1] During the 1950's and early 1960's, the property was used by the Kermac Nuclear Fuels Corporation to

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[1] The Mill's assertion that the property in question is industrially-zoned (Petition, p. 3) is contradicted by the testimony of its own witness that the property was "unzoned." (r. v. IV, p. 377).

mill uranium ore for sale to the U.S. government. Milling operations were conducted pursuant to a U.S. Atomic Energy Commission ("AEC") license which authorized possession of uranium ore. Milling operations ceased in 1962 and the property has been contaminated with radioactive mill tailings ever since.[2] However, the nature and extent of this contamination, and its threat to public health and safety, did not become known for another 15 to 20 years after milling operations ceased (r. v. II, p. 59; v. III, pp. 234-237; v. VI, pp. 791-795, 812, 897; Exhibit 35).

When Kermac sold the property to Colorado Ventures in 1964, the AEC issued a new license to Colorado Ventures authorizing only possession and storage of contaminated buildings and equipment (r. v. II, pp. 56-57). This new license applied only to buildings and equipment and not to the mill yard since it was unknown at the time that contaminated soil in mill yards may also pose a threat to public health and safety (r. v. II, pp. 56-57).

In 1968, the AEC amended the license to allow sale of the equipment on the condition that it was sufficiently decontaminated in accordance with then-existing AEC standards (r. v. II, pp. 57-58). Also in 1968, authority over the license was transferred to Colorado when the AEC authorized Colorado to regulate materials previously regulated by the AEC. Agreement Regarding Discontinuance of Certain Commission Regulatory Authority and Responsibility Within The State, 33 Fed. Reg. 24 (1968). Prior to that time, the State of Colorado had established regulatory authority over other types of radioactive materials. As a

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[2] Radioactive waste from the milling process, called mill tailings, were deposited on the property in a large pile covering about 35 acres. The tailings pile has always been licensed and is not an issue in this case (r. v. I, p. 153).

result, by 1968, Colorado had full regulatory authority over all radioactive materials except those reserved to the exclusive jurisdiction of the federal government, namely fissionable materials used in weapons and power generation. *Id.*

In 1971, Colorado Ventures sought to have its license terminated after certifying to Colorado that the buildings and equipment had been decontaminated to standards prevailing at the time (r. v. III, pp. 876-877, 895; Exhibit JJ). In response, Colorado terminated the license.[3] Use of the mill yard (which was not licensed) and buildings was thus unrestricted (r. v. II, p. 58; v. VII, p. 934). At the time the license was terminated, radiation standards primarily concerned only alpha radiation; scientists did not recognize the harmful potential of other forms of radiation, such as gamma and beta radiation, for many more years (r. v. I, p. 148; v. II, pp. 72-80, 86).

The Mill purchased the property in 1973. This was about the same time that the attention of health officials turned towards radioactively-contaminated soil and mill tailings (r. v. VI, p. 845; v. VII, pp. 861-862, 891-892). Studies showed that uranium mill yards and tailings, once thought harmless, were a serious health threat. 1978 U.S.C.C.A.N., pp. 7434, 7455.

Radioactive contamination was found throughout the mill yard by the Colorado Department of Health ("CDH") in 1976. CDH gave The Mill a report detailing these findings (r. v. II, p. 82; v. III, pp. 178, 234-237, 282; Exhibit OO)

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[3] Petitioner incorrectly states in its Petition that Colorado terminated the regulations (as distinguished from the license) (Petition, pp. i, 21). This is a critical distinction because the underlying regulations and authority were never terminated.

and advised The Mill to take precautionary measures as a result.

The health hazards posed by uranium mills and mill tailings became so apparent that Congress enacted UMTRCA in 1978. The express purpose of UMTRCA was to protect the public health and safety from the hazards associated with uranium mills. This purpose was carried out by providing for the decontamination, at state and federal expense, of 22 specifically-identified inactive uranium mill sites across the country. 42 U.S.C. §§ 7901, 7912. Congress designated the entire mill site at issue in this case, along with eight other sites in Colorado, for cleanup under UMTRCA. *Id.*

Radioactive contamination in the mill yard and buildings was confirmed by CDH in 1980 and 1982, and CDH again apprised The Mill of these findings (r. v. II, p. 59; v. III, p. 137; v. VI, pp. 769-770; 798-799).

With the knowledge of radioactive contamination in the mill yard and buildings, The Mill in 1983 leased part of the property to O.C. Coal Company. O.C. Coal intended to use the site to store coal for sale (r. v. III, pp. 210, 215). Although The Mill informed O.C. Coal of the property's designation under UMTRCA, it assured O.C. Coal that there were no contamination problems in the mill building (r. v. VI, p. 801).

The Mill notified Colorado of the lease with O.C. Coal one month after it was signed (Exhibit 10). Colorado responded to this notice with correspondence advising The Mill and O.C. Coal as to precautions that should be taken in view of the property's contamination (Exhibits 14, 18).

This correspondence prompted a meeting between The Mill, O.C. Coal, and representatives of CDH, wherein CDH's recommendations on safe use of the property were

discussed. As a result of this meeting, The Mill and O.C. Coal agreed to Colorado's recommendations (r. v. III, pp. 185-186, 226-228; v. VII, p. 907; Exhibit 12). For example, The Mill and O.C. Coal agreed to avoid mixing coal with contaminated soil, and to ventilate the buildings to avoid the build up of radon, a carcinogenic gas produced by the decay of uranium (Exhibit 12; r. v. VI, pp. 821-22, 826-27; v. VII, pp. 863, 898).[4] CDH reduced the agreement to writing and sent it to The Mill and O.C. Coal. The Mill then instructed its lessee, O.C. Coal, to follow the agreement and later informed Colorado that the agreement had been implemented (Exhibits F, G, H).

O.C. Coal broke the lease shortly thereafter for a variety of reasons, including a coal fire in the building, litigation over its business, a depressed local economy, conflicts with other tenants, imprudent business decisions,

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[4] The Mill's representation that by these recommendations, Colorado "restricted" use of any portion of the mill yard outside the building to a "50-foot strip" of ground (Petition, p. 7) is misleading for two reasons. First, the recommendations were not "restrictions" on the property, as The Mill implicitly acknowledges in its Petition (p. 6, footnote 3). Before trial, The Mill stipulated that the recommendations were "guidelines", and at trial one of The Mill partners testified he did not regard the recommendations as regulatory or compulsory (r. v. II, p. 60; r. v. VII, p. 972). Second, the pertinent portion of the document from which this statement comes and which describes areas of the mill yard free from contamination suggests an area much larger than fifty feet: ". . . a strip along the east fence approximately 50 feet wide and *widening to include all of the area* east of the office building at the north end" (Exhibit 16) (emphasis added).

and dilapidated conditions of the buildings[5] (r. v. II, pp. 168-169; v. III, pp. 187, 219-220; v. IV, pp. 384, 401; v. V, pp. 563-579; v. VI, pp. 739-742, 746-748, 767).

Not until O.C. Coal (which was now insolvent) broke the lease did The Mill find fault with Colorado's recommendations on safe use of the property. After first accusing the federal government of causing the loss of value of its property (r. v. III, p. 197; Exhibit K), The Mill then blamed Colorado for causing the lease to fail and sued for, *inter alia*, regulatory taking and inverse condemnation. For the first time The Mill began characterizing as "restrictions" the recommendations to which it had previously agreed.

At trial O.C. Coal testified that the recommendations on safe use of the property that it and The Mill had previously agreed to did not materially contribute to the failure of the lease (r. v. II, p. 231). This testimony was corroborated by the testimony of one of The Mill's own witnesses *and* its property manager, both of whom testified that the lease failed because it was inconsistent with prevailing market conditions (r. v. IV, pp. 384, 401; v. VI, pp. 746-749). Despite this, and despite the fact that the trial court found that the contamination on the property was a compelling public health hazard that rendered it "dangerous" and "not safe for public access" (Mill Appendix, pp. 131, 135), the trial court, after dismissing the inverse condemnation claim, found against the state on the regulatory takings claim. The court made this finding despite the fact that before, during, and after trial on the takings claim, The Mill continued to

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[5] The Mill says that its property was "improved" with a mill building and an office building (Petition, p. 3). In fact, the buildings were so dilapidated that the trial court felt they had no value at all (Mill Appendix, p. 142).

earn rental income from other tenants leasing the property.[6]

Colorado appealed the judgment on the takings claim and The Mill appealed the dismissal of its inverse condemnation claim. Ultimately, the Colorado Supreme Court affirmed the dismissal of the inverse condemnation claim and remanded the case for consideration of the regulatory takings claim and the state's defenses to it. *State of Colorado, Department of Health v. The Mill*, 809 P.2d 434 (Colo. 1991) (Mill Appendix, pp. 93-108).

During the pendency of the appeal of the regulatory takings issue, Colorado began an action to condemn the property in accordance with UMTRCA § 7914 and the state statute authorizing Colorado to participate in the implementation of UMTRCA (Colo. Rev. Stat. § 25-11-303(d)(III) (1989).

In lieu of an immediate possession hearing, by which Colorado could take possession of the property prior to a determination of just compensation, Colorado and The Mill stipulated that the property's contamination rendered its fair market value at zero ($0.00) and that Colorado's condemnation of the property was for a valid public purpose (Mill Appendix, pp. 155-157). There being no issues left for the trial court's determination, Colorado's motion that it be vested with title to the property was granted.

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[6] The Mill repeats in its Petition a mathematical error by the trial court (Petition, p. 7 n.4). In ruling against the state on the takings claim, the trial court stated that the taxes on the property ($5,000/year) exceeded the remaining rental income of the property ($500 to $700/month). A simple calculation shows this to be in error: $500 x 12 = $6,000.

The Mill appealed two collateral procedural issues in the eminent domain case. This appeal was consolidated by the Colorado Court of Appeals with the regulatory takings case remanded by the Colorado Supreme Court.

Declining to follow one of its own cases directly on point (and by the same judge) *Department of Health v. Hecla Mining Co.*, 781 P.2d 122 (Colo. App. 1989), (*cert. denied*), the Colorado Court of Appeals ruled in the eminent domain case that property condemned under UMTRCA had to be valued *as if* it was not contaminated. In the regulatory takings case, the court ruled that Colorado had effected a regulatory taking of the property (Mill Appendix, pp. 52-76). The Colorado Supreme Court granted certiorari and reversed the Colorado Court of Appeals on both issues. The Mill now seeks this Court's review of the Colorado Supreme Court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

The Mill attempts to portray the two issues in these consolidated cases as having national significance. The Mill does so by merging them artificially together and then by misstating their legal impact. In reality, there are two simple issues that do not deserve Supreme Court review. The first is whether the issue of how to value property condemned under UMTRCA is an important and unresolved federal issue. The second is whether the Colorado Supreme Court, under this Court's decision in *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), erred in applying state nuisance and property law to The Mill's takings claim.

The issue in the eminent domain case of how to value property condemned under UMTRCA is well-settled under federal law and relevant decisions of this Court; there is no open question under current law.

There is no real issue presented in the regulatory takings case that is deserving of Supreme Court review. The decision of the Colorado Supreme Court does not conflict with any decisions of this Court or any decisions of the United States Courts of Appeal and does not present an important question for this Court. The Colorado Supreme Court applied this Court's decisions in *Lucas* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) in a logical and unexceptional manner based on the facts before it.

I. HOW TO VALUE PROPERTY CONDEMNED UNDER UMTRCA IS WELL-SETTLED.

A. Application of the Rule Against Enhanced Value to Condemnations Under UMTRCA has been Resolved by Congress and is a Long-standing Doctrine in Federal Case Law.

The Mill argues in the eminent domain case that the Colorado Supreme Court erred in its valuation of The Mill's property. Specifically, The Mill argues that the rule against enhanced value should not be applied to condemnations under UMTRCA. The rule against enhanced value requires that, when determining the value of property being condemned, any increase in value caused by the project for which the property is condemned shall be disregarded. By this argument, The Mill is thus proposing that the govern-

ment pay for the decontamination of its property *and* also pay The Mill the increased value of the property caused by its decontamination.

Congress directed that sites designated in UMTRCA for decontamination be acquired by a participating state when necessary to prevent "windfall profits." 42 U.S.C. § 7913(c)(1) and § 7914(a); Mill Appendix, pp. 166-67. By this requirement, Congress intended to avoid the situation where the taxpayers pay for cleanup of property and the owner of the property unfairly receives the value of the decontaminated property by retaining it.

Where acquisition by eminent domain is necessary, Congress intended that state eminent domain law be followed. 1978 U.S.C.C.A.N., p. 7464. In Colorado, state eminent domain law includes a provision against enhanced value, and when it agreed to participate in UMTRCA, the Colorado legislature directed that acquisitions under UMTRCA be in accordance with Colorado's statutory version of the enhanced value rule (Colo. Rev. Stat. § 25-11-303(d)(III) (1989 Repl. Vol.); Mill Appendix, pp. 158-159).

Not only has Colorado included the prohibition against enhanced value in its laws, it is required by federal law to have such a provision in order to receive federal assistance under programs like UMTRCA. 42 U.S.C. § 4655 (Appendix B, pp. B-4-5). Consequently, Colorado's statutory version of the enhanced value rule is virtually identical to the federal rule against enhanced value. 42 U.S.C. § 4651(3) (Appendix B, pp. B-1-2). Compare Mill Appendix, p. 161.

Thus, UMTRCA requires compliance with state eminent domain law, and the statute authorizing Colorado to participate in UMTRCA specifically references Colorado's statute

against enhanced value. That statute, in turn, is a requirement of federal law.

The federal law prohibiting enhanced value was adopted by Congress in 1971, well before UMTRCA took effect. Although it could have done so, Congress did not exempt UMTRCA from this (or the state's) enhanced value statute when it enacted the law in 1978.

The prohibition against enhanced value is well established in federal case law as well. *United States v. 320 Acres*, 605 F.2d 762 (5th Cir. 1979). It derives from two U.S. Supreme Court cases that date to the late 1800's. *Id.*, at 784. *Kerr v. South Park Commissioners*, 117 U.S. 379 (1886); *Shoemaker v. United States*, 147 U.S. 282 (1893).

There is no unsettled issue as to whether the rule against enhanced value applies when determining the value of property condemned under UMTRCA. Therefore, there is no question that should be resolved by this Court. The rule is a matter of federal and state law, and it plainly applies to condemnations under UMTRCA. It is undisputed that Congress intended acquisitions under UMTRCA to comply with state law, and in Colorado (as well as in federal law) the enhanced value rule is so clearly the law that merely quoting it is sufficient. *City and County of Denver v. Smith*, 152 Colo. 227, 381 P.2d 269 (1963). The Mill's depiction of Colorado's statute on enhanced value as a quirk in state law that is repugnant to UMTRCA is in itself erroneous.

B. The Mill's Arguments on How to Value Its Property are Based Upon Misinterpretations of UMTRCA.

In an attempt to escape the enhanced value rule, The Mill offers several interpretations of UMTRCA designed to allow the award of enhanced value to The Mill. None of The Mill's interpretations have any merit and all must be rejected. In addition to the failure to present a meritorious argument, The Mill fails to raise an issue which this Court should address.

In furtherance of its argument that it is entitled to both government decontamination of its property *and* to value enhanced by its decontamination, The Mill argues that although Congress intended to prevent windfall profits, the term "windfall profits" does not refer to enhanced value. Rather, The Mill argues that the term refers to the cost of decontamination. Thus, according to The Mill, Congress did not intend to prevent enhanced value. The Colorado Supreme Court rejected this argument and concluded that the increase in a property's value caused by its decontamination under UMTRCA was a "windfall profit." (Mill Appendix, p. 25). Thus, reaping an unearned and government-funded increase in value was exactly what Congress sought to avoid by requiring acquisition of property to be decontaminated when necessary to prevent windfall profits. *Every* UMTRCA site will have decontamination consts. It makes no sense, then, for The Mill to argue that Congress would prohibit windfall profits in one part of a statute and require it in the form of enhanced value in another part of the same statute. The Mill's interpretation of UMTRCA equating the term windfall profits with decontamination cost thus renders Congress' attempt to prevent windfall profits meaningless.

As The Mill notes, the term "windfall profits" is not defined in UMTRCA or its legislative history. Thus, the

Colorado Supreme Court did what any other court would have done in this situation: it gave the term its commonly understood meaning (Mill Appendix, p. 25). Resort to the commonly understood meaning of an undefined statutory term is a normal judicial function. Further, the court's resultant definition of the term "windfall profit" is in fact consistent with federal court interpretations of the term "windfall." In *United States v. 320 Acres*, 605 F.2d 762 (5th Cir. 1979), the circuit court of appeals termed government-conferred, enhanced value, a "windfall." 605 F.2d at 782.

The Mill's argument that the term "windfall profit" refers to the cost of decontamination and not enhanced value must be rejected as inconsistent with the plain language of the statue (Mill Appendix, p. 24).

The Mill's suggestion that it is entitled to enhanced value because decontamination is an inherent aspect of the property is also without merit. The Mill argues that UMTRCA's "overriding intent" is that DOE has a firm obligation to decontaminate every UMTRCA-designated site (Mill Petition, p. 18). Therefore, according to The Mill, enhanced value is not a windfall profit. On the contrary, although Congress undoubtedly intended that DOE fully implement and complete the remedial program created by UMTRCA, it expressly conditioned continuation of the program on annual appropriations and authorization:

> The authority under this title . . . requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation acts.

42 U.S.C. § 7923; Appendix A. *See also* 42 U.S.C. § 7922, Appendix A.[7] If Congress cut off funds for or terminated UMTRCA tomorrow, The Mill would have no right whatsoever to compel the cleanup of the property. The 'overriding intent' of UMTRCA is to decontaminate these properties, but in a manner that minimizes the costs to the public. 1978 U.S.C.C.A.N., pp. 7461, 7465. Thus, The Mill cannot argue that it is entitled to enhanced value merely because every property must be decontaminated.

This Court should not grant a Writ of Certiorari based upon The Mill's misinterpretation of UMTRCA. Supreme Court Rule 15.1.

C. The Mill has not Provided a Valid Reason for Departing from the Fair Market Value Rule.

The Colorado Supreme Court held that the fair market value rule requires exclusion of enhanced value. Mill Appendix, p. 17. In another effort to escape the prohibition against enhanced value, The Mill argues that, under the Just Compensation Clause, deviation from the normal fair market value rule is warranted if application of the rule results in manifest injustice. Citing what it calls the "extreme inequity" of the rule against enhanced value, The Mill argues this is such a case and, therefore, the court below should have deviated from the fair market value rule by disregarding its enhanced value component. In effect, The Mill is arguing that it will suffer a manifest injustice unless its property is

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[7] These two sections of UMTRCA were not included in Appendix L to The Mill's Petition.

decontaminated *and* it is awarded a bonus in the form of publically-funded enhanced value.[8]

The fallacy of this argument is patently obvious, and ignores the fact that the Just Compensation Clause requires fairness and equity to the owner *and* the public, *United States v. 320 Acres*, 605 F.2d at 780, and that the enhanced value rule is designed to prevent manifest injustice to the public in the form of *over*compensation. *Id.* at 781-782 (emphasis added). Thus, the rule is to prevent owners such as The Mill from extracting, under compulsion of the Just Compensation Clause, profits that result from the government's action. *Id.* at 786.

Value attributable to the government's project is not just compensation, *United States v. Reynolds*, 397 U. S. 14 (1970); *see also United States v. Miller*, 317 U.S. 369 (1943), and *United States v. 320 Acres*, *supra* at 782-783, and enhanced value is a prime example of overcompensation. The Mill's argument that the Colorado Supreme Court should have deviated from the fair market value rule in a manner that awards The Mill the value of its property as enhanced by the decontamination project for which it was condemned is thus contrary to federal law and this Court's decisions in *United States v. Reynolds* and *United States v. Miller*, *supra*.

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[8] The Mill bases this argument in part upon the fact that it received nothing for its property. The Mill makes this argument despite the fact that it stipulated to the property's fair market value as zero dollars (because the costs to decontaminate the property exceeded its fair market value even if it was uncontaminated). Further, if property has no value, the Just Compensation Clause does not require the court to ignore reality and order compensation regardless. *United States v. 320 Acres*, *supra* at 820 n.131.

The Mill offers other arguments as to why the fair market value rule should not be followed in this case, but none of these arguments have any merit and do not deserve the attention of this Court.

For example, endeavoring to avoid the enhanced value rule, The Mill argues that condemnations under UMTRCA are unique because they are for a public purpose rather than a public improvement. Therefore, The Mill argues, the normal fair market value rule should not be followed in condemnations under UMTRCA. There is no distinction in the law between condemnations for public purposes and for public improvements. 2A Nichols, *The Law of Eminent Domain*, § 7.029[2] (Rev. 3rd Ed. 1993). This explains why The Mill provides no citation to authority to support this argument. Further, The Mill has provided no explanation (other than its own one-sided view of fairness) why condemnations under UMTRCA should not be treated like any other condemnation. On the contrary, by its unqualified deferral to state eminent domain law, Congress clearly intended that such condemnations be treated like any other.

Moreover, merely because Congress did not specify in UMTRCA that any particular method to measure just compensation be used does not in itself justify deviation from the normal fair market value rule. If Congress had intended the result sought by The Mill (decontamination *and* enhanced value), it could have easily provided as much. No such intent on the part of Congress can be found in UMTRCA. Congress *did* direct that state eminent domain law be followed when acquiring property under UMTRCA, and state law clearly requires application of the fair market and enhanced value rules. To hold otherwise would impute an intent on the part of Congress that is not apparent or implied.

Finally, the Court should reject The Mill's argument that the Just Compensation Clause requires deviation from the fair market value rule in order to put The Mill in as good a position as if the property were not condemned. The Just Compensation Clause does require a property owner to be put in as good a position as if the property were not condemned, *United States v. Miller*, *supra*, but not more *Olson v. United States*, 292 U.S. 246, 255 (1934). By arguing for enhanced value through a deviation from the fair market value rule, the Mill is seeking to be overcompensated. Moreover, The Mill glosses over the fact that it *is* in as good of a position - if not better - as a result of the condemnation of its property under UMTRCA: the property has no value, and The Mill consequently has lost nothing, yet The Mill has been relieved of an enormous potential remedial liability by virtue of the state's acquisition (Mill Appendix, p. 34 n.16). It is ironic that The Mill nonetheless is seeking enhanced value of its property.[9]

Clearly, the usual rules for determining just compensation, including the fair market and enhanced value rules, apply to condemnations under UMTRCA, and how to value property condemned under UMTRCA is not an unresolved issue nor an important federal question. The Petition should, therefore, be denied.

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[9] "When there is reciprocity of advantage, then the claim that the government has taken property has little force." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

II. THE DECISION OF THE COLORADO SUPREME COURT DOES NOT CONFLICT WITH THE REGULATORY TAKINGS DECISIONS OF THIS COURT OR THE U.S. COURT OF APPEALS.

A. This Case Does Not Present A Takings Issue That is Properly Resolved By This Court.

The Mill also fails to present an issue worthy of this Court's review in the regulatory takings case. The Mill's suggestion that this case presents an opportunity for this Court to define the scope of the nuisance defense under *Lucas* must be rejected. Background principles of nuisance and property law are a matter of state law, *Lucas*, 112 S. Ct. at 2900, and this Court has repeatedly "eschewed any 'set formula' for determining [when a regulation goes] too far; it is essentially an *ad hoc*, factual determination." *Lucas*, 112 S. Ct. at 2893; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The scope of state nuisance and property law is thus an issue for state courts. *Ruckelshaus v. Monsanto*, 467 U.S. at 1001; *Lucas*, 112 S. Ct. at 2901. The Colorado Supreme Court's assessment of the state's nuisance, property, and regulatory law in effect when The Mill took title to the property is not an issue for this Court to determine.

Furthermore, it is unnecessary to decide the takings issue here because, by any standard, the activities involved in this case constitute a nuisance under *Lucas*.

B. The Colorado Supreme Court's Decision in This Case is Fully Consistent with This Court's Decisions in *Lucas v. South Carolina Coastal Council* and *Ruckelshaus v. Monsanto*, as well as Federal Circuit Court Decisions.

The Mill attempts to create an important regulatory takings issue out of a case that raises none. The Mill argues that the Colorado Supreme Court erred in finding that The Mill's investment-backed expectations were unreasonable. On the contrary, the court below relied squarely upon Supreme Court decisions for this determination.

The Mill is incorrect in asserting that *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S Ct. 2886 (1992) left open the issue of whether investment-backed expectations are subject to subsequent regulation pursuant to existing authority (Mill Petition, p. 21). This issue was squarely addressed in *Lucas* where this court held that it was open to the state to make the implications of its background principles of nuisance and property law explicit *at any point*. 112 S. Ct. at 2901 (emphasis added).

Likewise, there is no basis for the argument that the Colorado Supreme Court's decision was "flawed" because it "engrafted" the nuisance exception in *Lucas* onto the determination of an owner's investment-backed expectations (Mill Petition, p. 27). Uses that are forbidden under common law are not a part of an owner's "bundle of rights," *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and as this Court stated in *Lucas*, an owner's investment-backed expectations necessarily are determined in large part by an analysis of existing property and nuisance law: no compensation is due if [such] limitations . . . inhere in the title itself, in the restrictions that background principles of . . .

nuisance and property law already place upon such land ownership." *Lucas*, 112 S. Ct. at 2900.

Neither is there any merit to The Mill's argument that the Colorado Supreme Court erred in relying on this Court's decision in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) when it ruled that The Mill's investment-backed expectations were unreasonable. In *Monsanto*, which delt with the issue of whether a taking of commercial property (trade secrets) was compensable under the Fifth Amendment, this Court held that an analysis of an owner's investment-backed expectations may overwhelm the other two factors in a takings claim (character of the government's action and economic impact) so as to dispose of the takings claim. 467 U.S. at 1005. Quoting *Monsanto,* the Colorado Supreme Court held that The Mill's expectation that it could use radioactively contaminated property free from any regulation was so unreasonable that further inquiry into the takings claim was not necessary. Although not clear, The Mill apparently argues (without elaboration or citation to authority) that *Monsanto* is limited to trade secrets (commercial personal property) cases. Nothing in *Monsanto* limits this holding to personal property. Furthermore, since the definition of property for purposes of the Fifth Amendment is a matter of state law, *Monsanto*, 467 U.S. at 1001; *Lucas*, 112 S. Ct. at 2901, the Colorado Supreme Court's decision to apply the rule in *Monsanto* to heavily regulated activities on real property such as The Mill's as this Court did to commercial personal property in *Monsanto* does not conflict with *Monsanto* and does not raise a federal question.

There is nothing exceptional with the Colorado Supreme Court's application of *Lucas* and *Monsanto* to the facts of his case. Of the hundreds of cases applying *Lucas* and *Monsanto*, The Mill has failed to demonstrate why this one warrants this court's review.

Neither is there a conflict with federal circuit court decisions. The Mill attempts to portray the Colorado Supreme Court's decision as contrary to *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), but the argument is simply spurious. The Mill argues that since Colorado terminated the license on the mill buildings, a fact which The Mill gleaned from the state's files, the Colorado court erred in determining that Colorado's nuisance law precluded its takings claim. Thus, The Mill cites *Loveladies* for the proposition that, "nothing in [the State's] *files* . . . reflected a . . . determination that certain activities would violate Colorado's understanding of its nuisance powers." By this argument The Mill is blatantly mischaracterizing *Loveladies*. The court in *Loveladies* said it is the State's *conduct* -- not merely its files -- that reflects the State's understanding of its nuisance laws. 28 F.3d at 1183. Quoting this Court in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, ___ U.S. ___, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), the Court in *Loveladies* stated that the regulatory regime in existence at the time the owner took title was determinative of whether an owner's investment-backed expectations were reasonable. *Loveladies*, 28 F.3d at 1177. Thus, it is not the state's files on The Mill's property that reflect the state's understanding of it authority under nuisance law, but it is the law in effect at the time The Mill became the owner of the property.

Therefore, the Colorado Supreme Court's determination that The Mill's takings claim was precluded by reason of the extensive body of law regarding nuisances and radioactive materials in effect in Colorado when The Mill took title to the property (which was set forth by the Colorado Supreme Court in meticulous detail, *see* Mill Appendix, pp. 11-16, and which is not disputed by The Mill) is fully consistent with the federal circuit court's decision in *Loveladies*.

Finally, a critical fact distinguishes the results in *Loveladies* from the results in this case: unlike The Mill, the plaintiff in *Loveladies* purchased the property *before* the authority to regulate the property was established.

C. There is no Conflict Between the Decision of the Colorado Supreme Court and Decisions of the Federal Circuit Court of Appeals.

The Mill is also mistaken in its claim that the Colorado Supreme Court's failure to find a partial taking conflicts with *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (Mill Petition, p. 25). The Colorado Supreme Court *did* acknowledge that a partial taking could be compensable (if the regulation went "too far") (Mill Appendix, pp. 8-9). Thus, the very premise of The Mill's argument - that the Colorado Supreme Court rejected the notion of a partial taking - is simply wrong and the argument must be disregarded. There is no conflict whatsoever between the decision of the Colorado Supreme Court and *Florida Rock Industries* despite The Mill's attempts to create one.

CONCLUSION

The decision of the Colorado Supreme Court in this case does not present any unresolved important federal question nor any conflicts with federal law. The Colorado Supreme Court applied federal and state statutory and case law in a proper and unremarkable fashion. Accordingly, the Petition for Writ of Certiorari should be denied.

GALE A. NORTON
Attorney General
STEPHEN K. ERKENBRACK
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH*
Solicitor General
PATRICIA S. BANGERT
Deputy Attorney General

JERRY W. GOAD
First Assistant Attorney General
Natural Resources Section

Attorneys for Respondents

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5072
* Counsel of Record

APPENDIX A

URANIUM MILL TAILINGS RADIATION CONTROL ACT [42 U.S.C.]

§ 7922. Termination of authority of Secretary; extension of authority; annual Department of Energy authorizations; appropriations available for expenditure

(a) The authority of the Secretary to perform remedial action under this title shall terminate on the date seven years after the date of promulgation by the Administrator of general standards applicable to such remedial action unless such termination date is specifically extended by an Act of Congress enacted after the date of enactment of this Act.

(b) The amounts authorized to be appropriated to carry out the purposes of this title by the Secretary, the Administrator, the Commission, and the Secretary of the Interior shall not exceed such amounts as are established in annual authorization Acts for fiscal year 1979 and each fiscal year thereafter applicable to the Department of Energy. Any sums appropriated for the purposes of this title shall be available until expended.

§ 7923. Limitation of contractual authority

The authority under this title to enter into contracts or other obligations requiring the United States to make outlays may be exercised only to the extent provided in advance in annual authorization and appropriation Acts.

APPENDIX B

UNIFORM REAL PROPERTY ACQUISITION POLICY [42 U.S.C.]

§ 4651. Uniform policy on real property acquisition practices

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representatives shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In

no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 1 of the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a), for benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by title II will be available), or to move his business or farm operation,

without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property of a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this Act, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency

concerned has determined has little or no value or utility to the owner.

(10) A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine.

* * * *

§ 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after the effective date of this title [enacted Jan. 2, 1971], unless he receives satisfactory assurances from such acquiring agency that -

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301 [42 USCS § 4651] and the provisions of section 302 [42 USCS § 4652], and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 303 and 304 [42 USCS §§ 4653 and 4654].

(b) For purposes of this section, the term "acquiring agency" means -

(1) a State agency (as defined in section 101(3) [42 USCS § 4601(3)]) which has the authority to acquire property by eminent domain under State law, and

(2) a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation.

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No. 94-1706

In The

Supreme Court of the United States

October Term, 1994

THE MILL, a limited partnership,

Petitioner,

vs.

STATE OF COLORADO, DEPARTMENT OF HEALTH, and THE TREASURER FOR GUNNISON COUNTY, COLORADO,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The Mill incorporates the Questions Presented for Review in its Petition.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

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STATEMENT OF THE CASE

The Petitioner, The Mill ("The Mill") incorporates the Statement of the Case in its Petition.

ARGUMENT

I.

WHEN DOES THE FIFTH AMENDMENT REQUIRE THAT JUST COMPENSATION NOT BE MEASURED STRICTLY BY THE FAIR MARKET VALUE OF THE LAND TAKEN?

Respondent, State of Colorado, Department of Health ("CDOH"), suggests that this case is not worthy of this

Court's time or effort because the court below applied Colorado's rule that the ordinary measure of compensation in a condemnation case is the property's fair market value at the time the property is taken, *e.g., Williams v. City and County of Denver,* 147 Colo. 195, 198-202, 363 P.2d 171, 173-175 (1961). CDOH also argues that by demanding the decontaminated value, The Mill seeks to recover the value of its property enhanced by the cost of remedial actions undertaken by the United States Department of Energy ("DOE"). Instead, CDOH claims that The Mill should gratefully accept a zero condemnation award in return for being relieved of some enormous potential liability for the cleanup of its land.

The Mill believes this case merits review precisely because the court below ignored the Fifth Amendment Takings Clause when it affirmed The Mill's zero condemnation award. Instead of following the Fifth Amendment and applying fairness and equity principles as this Court has instructed, *see, e.g., United States v. Commodities Trading Corp.,* 339 U.S. 121, 70 S.Ct. 547, 94 L.Ed. 707 (1950), the court below embarked on a Supremacy Clause preemption analysis in order to apply Colorado's general condemnation precedent, App. 20-22.

CDOH attempts to distract this Court from the question raised by The Mill, i.e., when does the Fifth Amendment require the State to determine the value of condemned property by other than the ordinary measure, by characterizing it as a mere state law squabble. This Court has never suggested, however, that the Takings Clause is mere surplusage. *See, e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

All of The Mill's 61 acres of land is environmentally contaminated with radiation through no fault of The Mill. Under the Uranium Mill Trailings Radiation Control Act of 1978, 42 U.S.C. §§ 7901-7942 (1988) ("UMTRCA"), DOE must remediate the property, *see* 42 U.S.C. § 7912 (1988), as well as the twenty-one other designated "processing sites," 42 U.S.C. § 7912, at no cost to the respective property owners, including The Mill, *see* 42 U.S.C. § 7917 (1988). DOE could have elected to clean up and return the property to The Mill, as the Denver trial court assumed would happen, App. 140-141. Instead, DOE directed CDOH, as its agent, to condemn the property in fee before DOE conducted any remedial action.

This Court has been asked to depart from the "rule against enhancement" in other cases, *e.g., United States v. 50 Acres of Land,* 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984), but this Court has never been squarely asked to consider whether an owner's land can be worth nothing under the Fifth Amendment. In this case, this Court can identify the parameters of when and under what circumstances the Fifth Amendment requires a departure from the general rule this Court has laid down in order to put the owner "in as good [a] position pecuniarily as he would have occupied if his property had not been taken," *United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 279-280, 87 L.Ed. 336 (1943).

CDOH suggests that Congress could have abandoned the cleanup program it established in UNTRCA. Congress's ability to change its mind, however, did not invest DOE with discretion to perform remedial action at less than all designated sites, *see* 42 U.S.C. § 7912. Because DOE has a statutory duty to clean up every "designated

processing site" at no cost to the owner, whether or not the cooperative State acquires the property, 42 U.S.C. §§ 7912, 7917, the cost of cleanup cannot be considered an enhancement in the value of The Mill's property for determining condemnation value, *cf. 50 Acres*, 469 U.S. at 24. Here, CDOH has already condemned and taken The Mill's property but has not yet paid The Mill "just" compensation. Had DOE "borrowed" The Mill's property[1] and returned it after performing the necessary remedial action, CDOH could not have demanded that The Mill contribute to the remedial action plan costs. Likewise, the Fifth Amendment does not require The Mill to donate its property to CDOH in order to keep UMTRCA program costs to a minimum. The Mill cannot be made whole unless it receives the decontaminated value of its land.

II.

WHEN DOES A STATE'S REGULATION OF LAND SO INTERFERE WITH THE OWNER'S REASONABLE INVESTMENT-BACKED EXPECTATIONS THAT IT EFFECTS A COMPENSABLE TAKING?

CDOH asserts that whether The Mill acquired its land with reasonable investment-backed expectations is a question of state law which does not implicate the Fifth Amendment or merit this Court's review. In part, CDOH would ignore, as did the court below, the findings Judge Bayless made after hearing a six-day trial, in order to

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[1] Even under this hypothetical scenario, The Mill would have lost the improvements on the property.

present as "facts" evidence which Judge Bayless considered and rejected when he decided that CDOH effected a regulatory taking of the mill yard parcel, App. 122-146. *Cf. M.D.C./Wood, Inc. v. Mortimer,* 866 P.2d 1380 (Colo. 1994) (trial court's findings are binding on appellate review). CDOH would have this Court overlook the regulatory conduct, Brief in Opposition at 22, by which CDOH delicensed the mill yard in 1971 and later engaged in a "series of restrictive" communications and acts which together amounted to a regulatory taking of that mill yard, App. 129.

This Court should accept review in this case to settle whether a landowner's constructive notice of a State's existing regulations can defeat the landowner's reasonable expectations formed at the time he invests in and acquires his land. Although "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless," *Lucas v. South Carolina Coastal Council,* ___ U.S. ___, ___, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992); *compare Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1006, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (commercial trade secrets); *Golden Pacific Bancorp v. United States,* 15 F.3d 1066 (Fed. Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 420 (1994) (ownership in a bank), this high degree of State control over personal property cannot be constitutionally extended to land. "In the case of land, . . . the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact

recorded in the Takings Clause that has become part of our constitutional culture," *Lucas*, 112 S.Ct. at 2900.

The question of "how the owner's reasonable expectations have been shaped by the State's law of property," *Lucas*, 112 S.Ct. at 2984, n.7, necessarily involves State law in answering the Fifth Amendment question of whether the State's later conduct effects a regulatory taking of land. However, this Court's takings cases presuppose that a landowner forms investment-backed expectations for his property merely by purchasing the land, *e.g.*, *Lucas*, 112 S.Ct. at 2889; *First English*, 482 U.S. at 304, and "evince [not only] an abiding concern for the productive use of, and economic investment in, land, [but also for] a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause," *Lucas*, 112 S.Ct. at 2985, n.8.

In 1973, The Mill paid $260,000 for 61 acres of industrially-zoned[2] land in Gunnison, Colorado, adjacent to the local airport. At that time, the approximately 25-acre mill yard had been delicensed by CDOH and declared safe for unrestricted use. Based upon CDOH's prior termination of license no. SUA-809, The Mill purchased the entire 61 acres, including the approximately 35 acre tailings pile which remained subject to CDOH licensure. As Judge Bayless found, App. 137-138, The Mill was entitled to rely on that license termination when it purchased the land and formed investment-backed expectations for its future use, *see Loveladies Harbor, Inc. v. United States*, 28

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[2] At the time of The Mill's purchase, the entire 61 acres was zoned for industrial use. Up to the Denver trial, the land had been used for industrial or commercial purposes.

F.3d 1171, 1183 (Fed. Cir. 1994); *see also Monsanto*, 467 U.S. at 1005 (a reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need).

CDOH also argues that The Mill could have been prevented from using its land for any purpose on the premise that Colorado's common law would have permitted CDOH to abate a nuisance on The Mill's property. *Cf. Lucas*, 112 S.Ct. at 2900-2902. This Court's cases, however, "have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, [this Court has] not accepted the proposition that a State may completely extinguish a property interest or prohibit all use without providing compensation." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513, 107 S.Ct. 1232, 1256, 94 L.Ed.2d 472 (1987) (Rehnquist, J., dissenting); *cf. Lucas*, 112 S.Ct. at 2900 ("We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.")

In the Denver trial, Judge Bayless found that The Mill had not committed a nuisance on its property, App. 135, and that fact was binding on appeal, *Mortimer*, 866 P.2d at 1380. Nevertheless, the court below effectively reversed this finding. App. 14-17. Contrary to CDOH's bald assertions, the court's decision cannot be "defended [as an]

objectively reasonable application" of Colorado's "relevant precedents" which would "exclude those beneficial uses in the circumstances in which the land" was found at the time of trial, *see Lucas*, 112 S.Ct. at 2902, n.18.

The Mill does not concede that the court below properly considered nuisance law as part of its determination of The Mill's reasonable expectations for its property. *See* Petition at 27. However, assuming that *Lucas* contemplates this type of analysis, this Court remains the final arbiter of whether CDOH could constitutionally rely on Colorado's common law of nuisance to preclude The Mill from using its property for any purpose, *see Lucas*, 112 S.Ct. at 2902, n.18. Although State law must be evaluated to determine this issue, the question is appropriate for this Court's review.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

GEORGE ALAN HOLLEY
Counsel of Record
ERIC E. TORGERSEN
HOLLEY, ALBERTSON & POLK, P.C.
1667 Cole Boulevard
Suite 100, Building 19
Golden, Colorado 80401
(303) 233-7838

Attorneys for Petitioner